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AN ADPE PROTEST PRIMER:
LESSONS LEARNED
FROM GSBCA PROTEST DECISIONS

by

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The General services Administration's Board of Contract Appeals (GSBCA) is a significant venue for Federal Automated Data Processing Equipment (ADPE) protests. Since the GSBCA was granted jurisdiction over Brooks Act ADPE procurements in 1985, over 1,200 decisions have been rendered. Developing lessons learned from these protest decisions will benefit Federal ADPE managers by increasing awareness of the protest process. The highly complex Federal ADPE acquisition process is governed by numerous statutes and regulations. This study also discusses the pertinent statutory background of the protest process, as well as the protest process itself. General lessons learned are presented in areas such as acquisition phases most likely to sustain protests and the amount of processing time expected for protest actions. Specific lessons learned pertaining to GSBCA jurisdiction, timeliness of protests, and evaluation/selection of offers are also presented. The study is intended to serve as a sound overview of the protest process, its mechanics, and lessons learned from over 200 significant GSBCA decisions. The primer is intended to serve as an introductory document for the new Federal ADPE manager.

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An ADPE Protest Primer:
Lessons Learned From GSBCA
Protest Decisions

by

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ABSTRACT

The General Services Administration's Board of Contract Appeals (GSBCA) is a significant venue for Federal Automated Data Processing Equipment (ADPE) protests. Since the GSBCA was granted jurisdiction over Brooks Act ADPE procurements in 1985, over 1,200 decisions have been rendered. Developing lessons learned from these protest decisions will benefit Federal ADPE managers by increasing awareness of the protest process. The highly complex Federal ADPE acquisition process is governed by numerous statues and regulations. This study also discusses the pertinent statutory background of the protest process, as well as the protest process itself. General lessons learned are presented in areas such as acquisition phases most likely to sustain protests and the amount of processing time expected for protest actions. Specific lessons learned pertaining to GSBCA jurisdiction, timeliness of protests, and evaluation/selection of offers are also presented. The study is intended to serve as a sound overview of the protest process, its mechanics, and lessons learned form over 200 significant GSBCA decisions. The primer is intended to serve as an introductory document for the new Federal ADPE manager.

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I. INTRODUCTION TO A PRIMER ON ADPE PROTESTS

Oversight and regulation have long been a part of the Federal Automatic Data Processing Equipment (ADPE) acquisition scene. In the early years of Automatic Data Processing (ADP) systems development, the cost of ADPE generally limited acquisition of computer technology to either large companies or the Federal government. The high cost of these systems insured Congressional attention would be focused on the acquisition of ADPE. Arguable, the "Brooks Act" of 1965 has had the most significant impact on the process of Federal ADPE acquisition of any single piece of legislation. Additional statutes and agency regulations (most notably the GSA's Federal Acquisition Regulations (FAR)) have further controlled the acquisition process. Congressional interest in ADP acquisition has not diminished despite the fact that the unit cost of ADPE processing and storage capacity has drastically decreased from the early 1960's levels. Furthermore, the widespread distribution of ADP technologies in DOD and Federal government will continue to focus attention and regulatory control on these capable technologies.

ADP systems are a vital element in the execution of virtually any department or agency mission. The Federal ADP manager must understand both statutes and regulations that govern acquisition of ADPE in order to

effectively design and acquire ADP systems that will improve the effectiveness of their organizations.

This study has a dual intent. The first intent is to provide the new ADPE manager a basic awareness of the details the Federal ADPE acquisition protest process. The second intent is to develop lessons learned from General Services Administration Board of Contract Appeals (GSBCA) ADPE protest decisions. In effect this study will serve as a primer to familiarize new Federal ADPE managers with the ADPE protest arena. Armed with this knowledge, the new manager can hopefully avoid or at least minimize the likelihood that a filed protest will delay the delivery of their user's program or project. This in turn will minimize the loss of program funds or any additional costs to the taxpayer.

Lessons learned from ADPE protest decisions can be developed from three related but distinct perspectives - the lawyer's perspective, the contracting official's perspective, and the ADPE manager's perspective. All three are important players in the acquisition and protest process. Each is concerned with a different aspect of protest decisions since each has specific responsibilities in the protest process. The lawyer plays a vital role of developing the defense strategy for dealing with the protest. The contracting official can often prevent protests through careful conduct of the contracting aspects of the acquisition. In the case of a protest, the contracting official along with the ADPE manager, may have to restructure the procurement strategy to satisfy GSBCA directives. The ADPE manager must work closely

with the counsel in the development of the protest defense. Ideally, the manner in which the ADPE manager and contracting officer conduct the acquisition will not require the extensive services of counsel. This study will concentrate on ADPE protests from the perspective of the ADPE manager. Therefore, highly technical issues not of general interest that specifically concern either the lawyer or the contracting official will not be addressed here.

The initial design of this research effort was to draw together information and lessons learned from General Services Administration (GSA) Board for Contract Appeals (GSBCA) bid protests. Protests relating to Department of the Navy (DON) ADPE acquisition efforts were to be primarily targeted, with other Department of Defense (DOD) and Federal ADPE acquisition efforts as secondary issues. The GSBCA is a primary venue for Federal ADPE protests although other avenues of protest exist. The specific legislation authorizing this jurisdiction is discussed in the following chapter. As research progressed, it became evident that the DON protest statistics very closely mirrored the overall Federal agency statistics. In fact the correlation coefficient between the Federal and Navy protest data was a strong 0.996. The correlation coefficient statistic measures the strength of the linear relationship between two variables, in this case DON protests and DOD and other Federal protests. DON ADPE protest data (190 cases) in seven categories (decisions rendered,

granted, denied, dismissed, settled, withdrawn, and costs awarded) were correlated with like categories from other DOD and Federal agencies' data (1208 cases).

With Navy protests representing one sixth of over 1,200 Federal agency ADPE protests filed since 1985, it made sense to expand the scope of this study to include lessons learned from other Federal ADPE protests as well. Since the GSBCA's jurisdiction is specifically general use ADPE, it made sense to study other Federal GSBCA cases to broaden the base of lessons learned. Particular attention was directed to protests summarized in the GSA's quarterly *ADP Protest Report*. It was also necessary to review specific GSBCA cases in the published proceedings of the GSBCA for details unavailable in the summaries.

Another issue relating to the scope of this study was a need to limit the research to some subset of the overall protest forum. As discussed in later sections of the study, the GSBCA is but one of several protest venues available to the disappointed offeror/bidder. Since the GSBCA protest venue is popular in the ADPE arena, and due to time constraints, this study concentrates primarily on GSBCA rulings. In addition, significant appeals of GSBCA decisions to the Court of Appeals for the Federal Circuit are also addressed.

For the purposes of this study, the term ADPE or automatic data processing equipment is used throughout when referring to computer equipment. ADP and ADPE are largely dated terms referring primarily to

computer equipment. A more current term used by the GSA is FIP or Federal Information Processing equipment. The FIP label seeks to overcome two limiting connotations inherent in both the ADP and ADPE labels. The first being that the terms refer only to computer hardware, and secondly that associated legislation using these terms refers only to hardware.

As will be discussed later, the original provisions of the Brooks Act of 1965 were expanded by the Paperwork Reduction Reauthorization Act of 1986 to include the regulation and oversight over not only computer equipment but associated services as well - including aspects of connectivity (telecommunications) necessary for system operation. The Paperwork Reduction Reauthorization Act of 1986 provides a comprehensive and updated definition of ADPE in the Brooks Act (P.L. 89-306). [Ref. 1]

This primer is intended to provide an overview of the protest process and derive lessons learned from over 200 GSBCA decisions. The detailed Table of Contents allows easy access to specific issues as well as orientation to general subject categories.

II. PROTESTS AND THEIR STATUTORY ORIGINS

A. INTRODUCTION TO PROTESTS

The intent of this chapter is to provide information and suggestions that may lead to the successful navigation of the ADPE protest "mine-field" that awaits the new ADPE manager. Primary attention is directed toward developing an understanding of the protest process and its statutory origins. Subsequent chapters discuss lessons learned from GSBCA-ADPE protest decisions. Protests are administrative or legal proceedings brought against the Government. A protest alleges a violation of statute or regulation in the acquisition arena. The applicable statutes and regulations have their roots in Governmental oversight, and virtually all government procurement actions are subject to this oversight. Oversight may exist within a given agency or may be external to that organization, such as a Congressional committee oversight. A primary factor for the amount of oversight afforded ADPE procurement, is the significant amount spent by Federal agencies on ADPE - presently exceeding $20 billion annually. [Ref. 2]

B. OVERVIEW OF THE FEDERAL ADPE ACQUISITION PROCESS

ADPE protests are neither intended nor desired events. They are an off-shoot of "doing business" in the ADPE acquisition arena. These protests result in part from the perception of contractors that government has been unsuccessful in meeting the dictates of applicable statutes and regulations.

Very briefly, the acquisition process entails assessment of user requirements, development of system requirements in the form of a Request for Proposals (RFP), assessment of received proposals, and selection of winning proposal (award). Assuming that the entire process is completed in a nearly flawless manner, a protest is not likely.

The Federal ADPE acquisition process is arguably a detailed one. Numerous statutes and regulations (Federal, DOD, and DOD agency) detail a myriad of well intentioned dictates that must be followed. Both overall acquisition regulations (such as the GSA's Federal Acquisition Regulation (FAR) which pertains to all acquisitions - both ADPE and non-ADPE) as well as ADPE specific regulations, must be adhered to. Thorough knowledge of the FAR alone is not sufficient for the manager. ADPE specific regulations modify the more general FAR provisions and the program manager (PM) must be equally aware of these. The GSA Information Resource Service (IRMS) issues Federal Information Resource Management Regulation (FIRMR) bulletins of both mandatory and advisory nature. Agency specific guidelines further restrict what must and what must not be done.

Violation of mandatory provisions of any of the aforementioned guidelines can result in a protest action. If the alleged violation of a regulation or statute is indefensible, costs and corrective action may be directed.

ADPE acquisition by its very nature, must address not only assessment of a user's needs/requirements, but turn this assessment into a viable requirements statement. Even while the requirements statement is being drafted, tailoring of the highly structured and exacting Federal contracting process begins. Additionally, the PM must protect his/her project's funding in the cyclical (and volatile) Federal budget process.

Basically a three tier control structure governs governmental computer management: the agency at the "bottom"; the regulatory agencies OMB/GSA/ NBS (now NIST) in the "middle"; and Congress at the "top." Congressional oversight is provided by such committees as the House Government Operations Committee/Senate Government Affairs Committee, the House and Senate Appropriations Committees, and the various House and Senate agency committees (i.e. Defense/Interior/Judiciary, etc.) The magnitude of the ADP procurement maze becomes even more apparent upon further analysis of internal agency (bottom) layer control structures of large departments such as the Department of Defense and the individual DOD services and agencies.

The Department of the Navy ADPE manager must be familiar with a whole host of procurement directives. The following list includes many of these directives:

- DOD 7920.1 Life Cycle Management
- NAVDAC Pub 24.1 Program Management Documentation (PMP & Annexes)
- NAVDAC Pub 24.2 Systems Decision Documentation (MENS,SDP)
- NAVDAC Pub 15 Economic Analysis Procedures for ADP
- ADPSO INST 4235.1 Guide to Preparation of Requirements Packages
- Federal Information Resources Management Regulation (FIRMR)
- FAR (Part 270)
- Brooks Act of 1965 and its amendments
- Competition in Contracting Act of 1984 (CICA)
- Warner Amendment (10 U.S.C. 2315)
- Avenues of ADPE protest
- GSBCA decisions and guidelines

In addition to the various directives, the PM should also follow the actions and intentions of various Congressional oversight committees that are the source of many new ADPE acquisition controls. The House Committee on Government Operations, formerly chaired by Representative Jack Brooks and now chaired by Representative John Conyers, is a notable example of such a proactive committee.

One way for a new ADPE manger to quickly sample the flavor of ADPE acquisitions is by talking to an experienced manager or studying available

lessons learned articles written by experienced managers. An example is an article entitled "The Good, The Bad, and The Ugly" discussed in the following paragraph. Another source of lessons learned can be found in the quarterly GSA IRMS' *ADP Protest Report*.

An excellent from-the-heart assessment of what a Federal ADPE manager can typically expect to face in an ADPE acquisition can be found in an article by Kathy Kircher and Robert Rosen (U.S. Army Harry Diamond Labs (HDL), Maryland). Their experiences encountered during their 1987 effort to replace a 1976 vintage IBM mainframe computer with newer technology, are illuminating. The HDL acquisition article is well written, detailed, and occasionally humorous. It is readily apparent to anyone studying the Federal acquisition process that a good sense of humor is likely one of the more valuable traits an ADPE manager can posses next to attention-to-detail, patience, and persistence.

Kircher and Rosen summarized their experience at HDL in the following manner:

> "The [acquisition] process was grueling. We had pushed ourselves to the limit, thinking that when the contract was signed we could finally collapse and relax [after a 10 month contracting effort]. Thus we were totally unprepared for the stress of the protest that was to follow." [Ref. 3]

C. THE MECHANICS OF ADPE PROTESTS

In the briefest of summaries, an ADPE protest is a mechanism for offerors/bidders to protest procurement actions of Government officials. In general, a protest must allege a violation of: statute, regulation, or delegation of procurement authority (DPA). CICA provides a primary basis for protest action. There are typically three time frames that protest actions are filed during the procurement process. In layman's terms these are: prior to the bid due date (to protest specifications), after bids are received but prior to award (to protest being excluded from the competitive range), and finally after award has been made (to protest improprieties in contract). These phases are commonly referred to as Solicitation, Pre-Award, and Post-Award respectively. Solicitation typically covers the period between Request for Proposals (RFP), Invitation for bids (IFB), or Commerce Business Daily (CBD) notice and the time bids are received. Pre-Award encompasses the period between receipt of offers/bids and award of the contract/purchase order. Post-Award is the period onward after award of the contract/purchase order.

Protests can occur throughout all phases of the procurement process, provided they are filed in the appropriate time frame that allows corrective action by the GSBCA. Cumulative protest data for the first five and one-half years of GSA IRMS data collection (Jan 1985-Jun 1990) yields the following analysis of protest filing - procurement phase occurrences. This information offers insight into when you can typically expect a protest to occur. Of the

1032 protests filed during the period, 23.7% (245 cases) occurred in the Solicitation phase, 15.6% (161 cases) occurred during the Pre-Award phase, 59.5% (614 cases) occurred during the Post-Award phase, and 1.2% (12 cases) were not applicable to this analysis. Thus roughly a quarter of the protests occurred during the Solicitation phase, likely due to issues pertaining to defects in requirements. Slightly under one in six protests occurred during the Pre-Award phase likely due to alleged defects in the competitive range determinations. Finally nearly 60% of the protests occur during the Post-Award phase, likely due to allegations of defects in the evaluation and award process. These figures have remained relatively constant over time and can be expected to be typical for future planning.

D. CHOICE OF PROTEST VENUE

Briefly, there are numerous venues available to the protestor. Figure 1 on page fourteen depicts the hierarchy of the protest process. Considerations that the bidder/protestor faces in choosing the venue of protest include the costs and time involved in formal court proceedings versus the more expeditious but informal administrative (BCA) approach. The administrative (BCA) approach also affords a degree of flexibility in choosing the location of the hearing, whereas the Claims Court location is fixed. According to the Government Contract Guidebook, nearly 75% of Armed Services Board of Contract Appeals (ASBCA) trials are held outside the Washington, D.C. area.

Discovery rules apply to both BCA and Claims Courts actions. Discovery includes the taking of dispositions, submission of written questions (interrogatories), requesting of documents, and admission to, or denial of, the truth of relevant facts. Thus the disappointed bidder is not at a significant disadvantage in initially selecting the administrative protest resolution route; formal court proceedings are always an option. A interesting provision of the Contract Disputes Act (CDA) allows not only the protestor to appeal an unfavorable board ruling, but the government as well. In any case, it is hoped that the party who builds a logical, factual case through documentation and testimony will prevail.

One final note for the Federal/DOD ADPE manager familiar with the contract protest process. ADPE protests are not always handled in the same manner as other non-ADPE protests. For those less familiar with this process, a brief summary follows.

The normal protest process begins with a written appeal/protest to the contracting officer (who has unilateral power to decide contract issues). Should the protestor not receive satisfaction from the contracting officer, an appeal to the respective Agency's Board. If the protestor still does not receive satisfaction, the protest can be raised before the appropriate Agency Board of Contract Appeals (e.g. Armed Services Board of Contract Appeals (ASBCA) or GSBCA) or the United States Claims Court. Should further appeal be necessary, the protest is brought before the Court of Appeals for the Federal

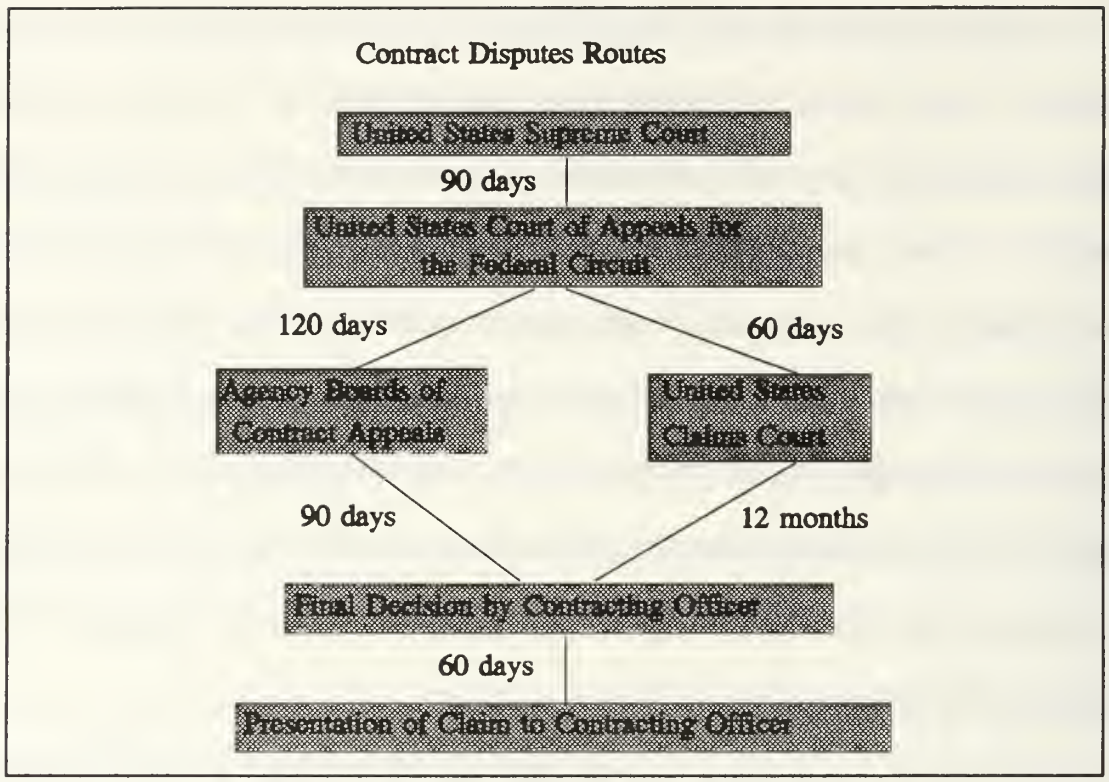

Figure 1

Circuit. Significant issues, including questions of procurement policy, can ultimately end with a decision by the Supreme Court (although this is a very rare occurrence). Note, in the case of awarding of bid preparation costs in successful bid protests, the Claims Courts previously possessed sole jurisdiction in providing pre-award relief. Now under CICA, The GSBCA can also award recoupment of costs in the case of successful ADPE pre-award protests. This is a clear departure from previous procedure. This shared jurisdiction continues to be the subject of dispute in the courts. For the present, the GSBCA's ability to award pre-award costs remains intact, and is an important consideration in the protestor's choice of venue.

E. THE IMPACT OF ADPE PROTESTS

The impact of ADPE acquisition protests is felt in two primary areas: (1) from the user's standpoint, delayed delivery of the needed system or hardware, and (2) from the acquisition office or agency standpoint, lost time and effort spent addressing the details of the protest process (which can translate into lost funding should compensative awards result from the protest). Since Federal managers are not afforded the luxury of budgeting specific funds to address/pay anticipated protest awards, realignment of project scope is often necessary if appeals for additional agency funds to satisfy the protest costs cannot be answered. The agency also has the option of applying for payment of settlement costs out of the permanent indefinite settlement fund (PISF), but there is no guarantee the request will be approved [Ref. 4]. The PISF is a revolving fund managed by the Treasury. The fund is used for the prompt payment of judgements against the Federal Government. In most cases, the fund is reimbursed by the agency incurring the protest/settlement. See Chapter IV, section A.7. for further details on the PISF.

The protest process has many costs to the Government, some obvious, others hidden. The primary protest costs mentioned in the preceding paragraphs were delays and the potential for lost funds within the often inflexible Federal budgeting process. Additional protest costs include the cost of responding to protest actions and hidden higher costs. Even if the Government prevails, direct costs (e.g. bid preparation costs) are often awarded

to successful protestors. The hidden costs that offerors likely factor in to their cost scheme to cover anticipated protest or intervenor action are costs ultimately paid by the Government and the taxpayer.

Clearly then, it is vitally important to the success of any ADPE acquisition effort to minimize or (ideally) avoid ADPE protest actions to the extent possible. These protests threaten not only timely delivery, but funding levels available for execution. Managers of troubled ADPE programs are also acutely aware of the potential for total loss of program funding should significant schedule slippage or performance shortfalls occur.

F. PROTESTS AND TIMELINESS OF THE ACQUISITION PROCESS

It is a well established fact that ADPE procurements are among the most complex and drawn out of all Federal acquisition efforts. The Comptroller General reported that many computer system procurements take as long as seven years [Ref. 5]. ADPE protests can contribute to the overall delay in a system acquisition. What magnitude of delay can be expected for the "average" protest? The length of protest delay varies from one protest to another depending upon the complexity of the issue protested and the venue in which it is presented. The General Services Administration's Board of Contract Appeals (GSBCA) is a primary venue for ADPE acquisition protests. Statistical data on GSBCA ADPE protest decisions are readily available from the GSA's IRM Acquisition Evaluation and Analysis Branch. These data offer

an insight into processing time for these protests and are depicted in the following figure.

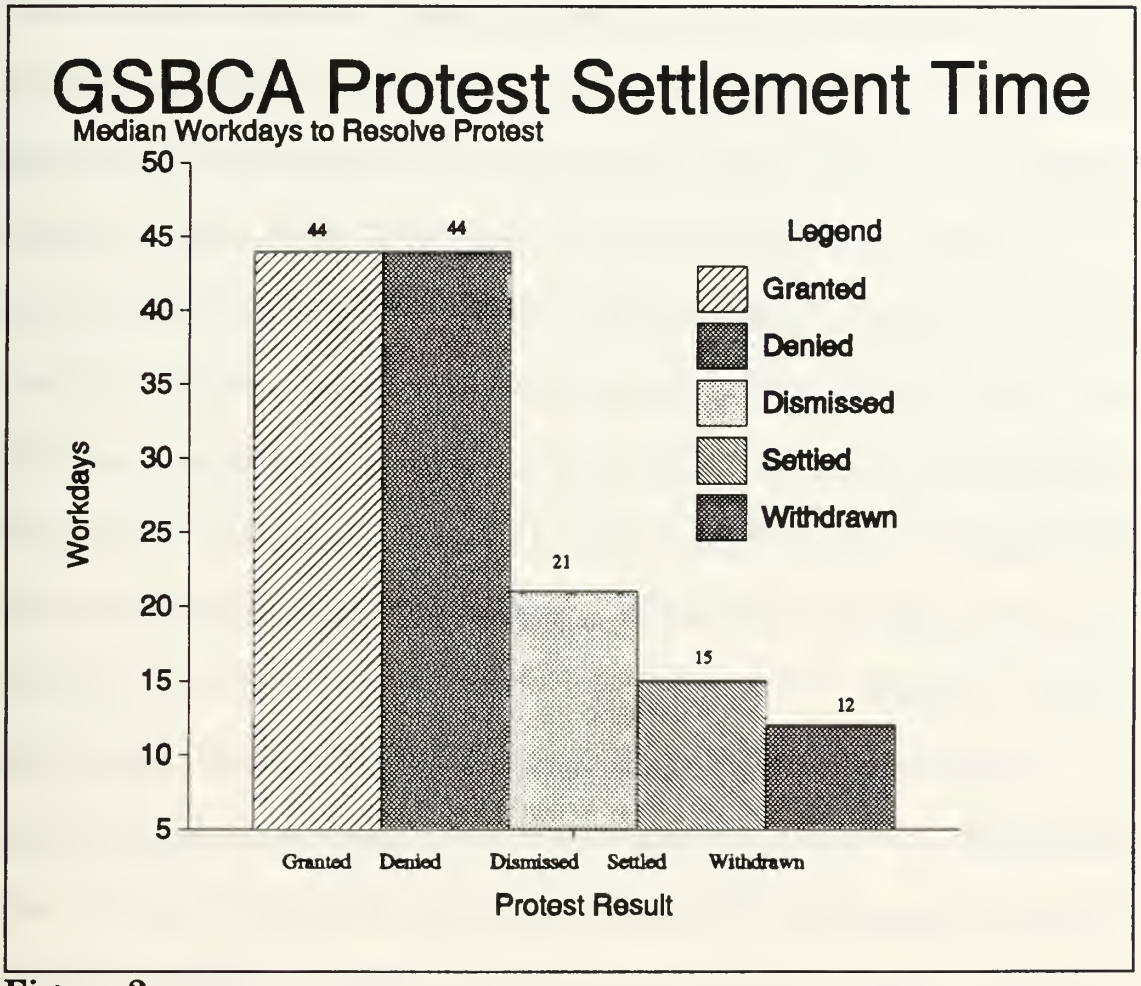

Figure 2

Figure 2 details median time expended (in workdays) to resolve the protest. The statistics were drawn from GSA's IRMS Acquisition Evaluation Analysis Branch database of GSBCA decision statistics issued since January 1985. The Branch also maintains specific information on the nature of the settlements.

It is important to note that the data depicted in Figure 2 (median workdays) pertains to singular instances of ADPE protest. Interpretation of these figures requires caution and common sense. A calendar month is roughly equivalent to a 20 workdays. In the case of any protest disposition, there is time lost which cannot be recovered, and the potential for cost awards against the government. Simply concluding that a typical settlement takes 16 workdays in fact implies a delay of over three weeks and may include as condition of the of the settlement that the Government field new offers or reevaluate existing offers which could add months to the procurement effort. A program or acquisition sustaining a series of protests over the life of its acquisition process, could sustain a cumulative delay measured in terms of months or years.

Contrasting the 44 median workdays (roughly 65 calendar days) required to complete a GSBCA decision with other protest proceedings under the Contract Disputes Act, the rapid speed of the GSBCA's action is readily apparent. Annual reports of the Armed Services Board of Contract Appeals (the largest agency board) noted in fiscal year 1986, an average protest docket time of 440 calendar days with accelerated protests taking 142 calendar days. The relatively stable GSBCA figure can be safely compared to the ASBCA figures. Even allowing for a seemingly disparate comparison of a median GSBCA figure to the ASBCA average figure, the order of magnitude difference in speed is still evident [Ref. 6]. Thus the reason for the popularity of

the GSBCA venue is readily apparent - "quick" decisions (and lower legal costs resulting in part, from the reduced decision time).

An example of a particularly troubled acquisition is the Navy's Desktop II Companion Contract ("Companion") which sought to provide needed system and maintenance support for the widely used Zenith Z-289 microcomputer. The Navy purchased over 360,000 of these microcomputers over the life of the highly successful U.S. Air Force administered Desktop II umbrella contract. Since the useful life of these microcomputers extended well beyond the life of the original Desktop II Contract, system upgrade and maintenance emerged as a significant user requirement. The Companion effort began in July of 1988 and lasted through February of 1991. The acquisition effort sustained substantial protest action with over 400 bidders and interested parties participating. The frustration inherent in the pursuit of the acquisition effort was evident in a comment by (then) Captain Katherine Laughton, commanding officer of the Navy's ADP selection Office (ADPSO) after one of many unfavorable GSBCA protest rulings on the Companion Contract:

> " My frustration, personally, is that when all is said and done we didn't deliver. The longer it takes us to get a contract out on the street the less value it has to the poor user. This extra delay will cost us. I feel very discouraged because I don't feel that anybody has been well-served by this action. Our job is to take care of the person who has that requirement, and we weren't able to do that." [Ref. 7]

After a lost appeal to the Board:

> "Cost of another protest is one of the reasons I don't want to go back to court. As a taxpayer I resent it, particularly for what may be a limited procurement. People may have found other ways to satisfy their needs by now. [Ref 7]

Later, Laughton's successor Captain Thomas McQueen commented after yet another protest action:

> "We kept it out of the courts for two whole weeks before they dragged it right back...What can they gain? Free and open competition? Another chance to participate? They already have that. All they do now is delay the process...We were just trying to get it back into the vendors' hands, but it looks like it's still in the lawyers...ISG? I don't know who they are or where they came from, but they're about three years too late to get into the game. They're not even on the mailing list..." [Ref. 8]

G. THE STATUTORY BACKGROUND OF ADPE PROTESTS

To understand ADPE protests, one must develop an understanding of the key pieces of legislation from which ADPE procurement oversight and regulation originate. The Competition in Contracting Act (CICA) of 1984 (Pub. L. 98-369.) and the Brooks Act of 1965 (Pub. L. 89-306) are central to ADPE procurement oversight as it exists today [Ref. 9] [Ref. 10]. Additional pertinent legislation includes the Paperwork Reduction Reauthorization Act (PRRA) of 1986 (Pub. L. 99-500), the Federal Property and Administrative Services Act (FPASA) of 1949, and the 1981 Warner Amendment attached to the 1982 Defense Authorization Act [Ref. 11]

[Ref. 12]. The Federal Courts Improvement Act (FCIA) of 1982 (Pub. L. 97-164) also made important changes effecting the handling of protests [Ref. 13].

H. COMPETITION IN CONTRACTING ACT (CICA) OF 1984

The primary vehicle under which dissatisfied bidders file their protests is the Competition in Contracting Act of 1984 (Pub. L. 98-368). The Act was sponsored by Representative Jack Brooks (also sponsor and author of the landmark Brooks Act of 1965). CICA sought to insure competition in Federal contracting actions by providing guidelines for fostering competition and bidder protest procedures with which to question government procurement actions. The Act modified many existing procurement/acquisition statutes and regulations including the Armed Services Procurement Act, the Federal Property and Administrative Services Act, and the Office of Federal Procurement Policy (OFPP) Act. Due to the significance of the CICA in understanding the background of ADPE protests, provisions of the Act will be discussed in detail in the following paragraphs.

CICA amended both the Armed Services Procurement Act (ASPA) and the Federal Property and Administrative Services Act (FPASA). ASPA policy was amended to include the use of advanced procurement planning supporting full and open contracting, simplification of the procurement process, use of commercial products as practicable, and use of functional specifications

whenever possible. Both ASPA and FPASA were modified to require competitive procedures supporting full and open competition, added A&E services to the Brooks Act jurisdiction, competitive selection of research proposals, placed formal advertising on a par with sealed bids for preference purposes, and significantly limited the use of non-competitive procedures.

Additional provisions of CICA mandated the use of sealed bids (if time permits, price or price related factors serve as award basis, discussions with bidders regarding the solicitation are not required, and there is a reasonable expectation that more than one bid will be fielded). A particular source could be excluded from the competitive process to support maintenance of sources of supply subject to three conditions. The three conditions are: (1) if increased competition and lower costs would result, (2) or supports the national defense in a national emergency or industrial mobilization, or (3) supports national defense by maintaining essential engineering or R&D by educational, non-profit institutions, or Federal research entities.

Regarding small business competition, CICA required *all* such businesses be allowed to compete in the event the agency head elects to limit competition to "small businesses." CICA did not however supersede or modify provisions of the Small Business Act (SBA).

CICA excused competition under the following circumstances:

- only one source of supply exists, and there is no suitable substitute

- unusual and compelling urgency with the potential for serious injury to the U.S.
- support facility, or R&D in the case of national emergency or mobilization
- required by international agreement or treaty
- dictated by statute or a brand name requirement exists
- disclosure of need to multiple bidders compromises national security
- agency head determines action is in the public interest and notifies Congress 30 days prior to award.

Other miscellaneous provisions were included in CICA. The Act stipulated that simplified procurement procedures would be available for small purchases ($25,000 or less), while still pursuing the stated goal of competition. CICA also extended the Truth in Negotiations provisions (requiring certified cost/pricing data by bidders) of the ASPS to the FPASA. The threshold for bidder submission certified costs/pricing was reduced from half-million dollars to $100,000 for ASPS and uniformly applied to FPASA. The Federal Acquisition Regulations were required to incorporate the provisions of CICA by March 1985.

Summarized, CICA amendments to the Office of Federal Procurement (OFPP) Act included: notices of solicitation and award were required above designated thresholds, required a minimum 30 day period between issuance of solicitation and submission of proposals, established an agency advocate for competition, mandated five years of annual agency reporting to Congress on

the agency's plans and accomplishments in fostering competition, and mandated the establishment and maintenance of computer based fiscal-year files of both competitive and non-competitive procurements (exempting small purchases).

CICA also laid out the following protest procedures:

- Codified and strengthened existing GAO bid protest procedures under the Budget and Accounting Act.
- Allowed filing of protests with the Comptroller General by any prospective bidder with direct economic interest in the solicitation, award, or proposed award.
- Established specific time limits for notification of and response by the protested agency.
- Suspended award until resolution of a pre-award protest action, unless the head of the procuring activity, determined urgent and compelling circumstances or national interest dictated award, without further delay.
- Suspended contract performance pending resolution of post-award protest action, unless urgent and compelling circumstances/national interest dictated performance without further delay (and the action is reported to the Comptroller General).
- Required corrective action on the part of the procurement agency (for sustained protests) or notification of the Comptroller by the agency of non-compliance within 60 days.

CICA established the following ADPE dispute resolution procedures:

- Set up a three-year test period allowing the GSBCA to resolve protests of ADPE under the provisions of the Brooks Act (this authorization was later extended indefinitely by Congress as a result of a provision in the Paperwork Reduction Reauthorization Act of 1986).
- Established time limits for board action (decisions).
- Mandated suspension of procurement authority/delegation of procurement

authority (DPA) (unless urgent and compelling circumstances/national interest dictated otherwise).

- Allowed suspension of a protested procurement and recoupment of costs (protest filing, pursuit, attorney's fees, and bid/proposal preparation costs) by the protestor in the case of sustained protests.

I. THE BROOKS ACT OF 1965

As previously stated, the Brooks Act of 1965 (Pub. L. 89-306) is arguably the earliest and most significant piece of legislation specifically intending to regulate the acquisition of ADPE and ADP services by agencies of the Federal government. The Act sought to foster the economic and efficient acquisition of federal ADPE. The Brooks Act has subsequently provided a base for additional amendments and related pieces of legislation regulating the conduct of federal ADPE procurement.

Understanding the background of the Brooks Act gives the Federal ADPE manager an insight into the sensitivity surrounding Federal procurement of ADPE. This understanding underscores the need to minimize controversy in ADPE acquisitions least increased Congressional investigations and further regulation follow. The provisions of the Act, however difficult to deal with, are a fact of life. The most commonly cited problem relating to the Brooks Act is the resulting delay(s) in the ADP procurement process. Studies have cited an average 25% increase in ADPE system procurement time since the Brooks Act was passed [Ref. 14]. The ADPE manager must continue to seek ways

to minimize inherent procurement delays while living up to the intent of the Act. At this point it is beneficial to examine the provisions, circumstances existing prior to its inception, and the intentions of the Act.

The Act was named after its sponsor and drafter, Representative Brooks (Texas). Throughout his 14 year tenure as Chairman of the House Government Operations Committee, Representative Jack Brooks, a partisan Democrat from Texas, sought to establish and maintain congressional oversight of Federal ADPE. Despite the fact that Brooks relinquished his chairmanship of the Government Operations Committee for that of the House Judiciary Committee in 1989, his statute serves as his legacy. His successor, Representative John Conyers (D-Michigan) shows every sign of fostering the continued growth in Congressional ADPE oversight [Ref. 15].

ADPE as addressed in the Brooks Act is considered to be general purpose, commercially available, mass produced automatic data processing equipments. The stated purpose of the Act is "to provide for the economic and efficient purchase, lease, maintenance, operation, and utilization of automatic data processing equipment by Federal departments and agencies." [Ref.10:p.1] Two consequential considerations were to (1) support competition in the private sector and (2) ensure that the minimum ADP needs of the government were met at least cost. Rep. Brooks feels that the Act that bears his name is his most important legacy and states "The Brooks Act opened up the government

marketplace to thousands of companies, and kept the leading edge of computer technology in the United States." [Ref. 16]

At the time of the Act, Brooks felt that International Business Machines (IBM) dominated the computer market, leaving the (government) buyer with little leverage. Brooks overcame significant bureaucratic resistance to the bill by enlisting the support of his friend President Lyndon Johnson. Shortly after his Act was passed in 1965, Brooks intervened in a GSA/Department of Agriculture ADPE lease request for proposal (RFP) that stipulated brand-name (IBM) equipment and warned Agriculture not to initiate similar actions in the future [Ref. 17]. More recently, a former top Navy procurement officer, Bob Dorman, observed that some big companies like Control Data and Unisys can directly credit their present existence to the Brooks Act [Ref. 18]. Brooks carefully defended and expanded the Act throughout his tenure as Chairman of the House Government Operations Committee.

The original Act put three agencies in charge of ADP procurement: (1) the General Services Administration (GSA) was designated overall administrator, responsible for Federal ADP procurement, (2) the Office of Management and Budget (OMB) was responsible for overall fiscal and policy controls that governed the GSA's actions, and (3) the National Bureau of Standards (now National Institute for Standards and Technology (NIST)) was tasked with developing federal information standards. In May of 1973, Executive Order 11717 modified the original responsibilities by transferring

policy responsibilities to the GSA's newly created Office of Automated Data Processing Management, with fiscal control remaining with OMB.

1. The Brooks Act and the Warner Amendment

In 1981 the scope of the Brooks Act was trimmed by the Warner Amendment 10 U.S.C. 2315 (Sponsor: Sen. Warner (R-VA)) and attached to the 1982 Defense Authorization Act [Ref. 12: p.11]. The amendment to the Armed Services Procurement Act conditionally exempted DOD ADP/ADPE from the Brooks Act and the Federal Property and Administrative Services Act of 1949: "... not applicable to the procurement by the Department of Defense of automatic data processing equipment or services if the function, operation, or use of the equipment or services...

1. involves intelligence activities;
2. involves cryptologic activities related to national security;
3. involves command and control of military forces;
4. involves equipment that is an integral part of a weapon system;
5. is critical to the direct fulfillment of military intelligence missions." [Ref. 12: p.12]

The amendment goes on to say that ADPE or ADP services procured for routine administrative and business applications are not included in the exemption (and are therefore subject to the provisions of the Brooks Act). It

should be noted that the Warner Amendment was passed despite strong opposition by Brooks and his allies in Congress.

2. The Brooks Act and CICA

In 1984 Brooks sponsored the previously discussed Competition in Contracting Act (CICA) The GSA Board of Contract Appeals was designated the primary ADPE bid protest review entity [Ref. 19]. These ADP bid protests began to provide a steady stream of customers for the Board [Ref. 20]. The GSBCA further defined its role in ADP protest adjudication to include ADP services as well as ADPE based upon the Brooks Act [Ref. 21]. The GSBCA reasserted its interpretation of its jurisdiction over ADP services despite an earlier 1976 OMB interpretation excluding ADP services from the Brooks Act's coverage [Ref. 22]. Further defining ADPE as depicted in the original Brooks Act, the GSA includes Local Area Network equipment as ADPE [Ref. 23]. It should be noted that continual reinterpretation of the Brooks Act language has been necessary over the years as the general nature of the verbiage in the legislation had to be applied to technologies and services that often did not exist at the time of the 1965 Act's enactment. Presently the jurisdiction of the GSBCA in ADPE protest matters has reached an equilibrium of sorts and little change has taken place in either its jurisdiction or the definition of ADPE/ADPE services.

3. Assessment of the Brooks Act Effectiveness

In 1986 Rep. Brooks asked the GAO to report on the effect of the Warner Amendment since its inception, and comment on its effect on competition mandated under the Brooks Act, and its effect on reducing DOD procurement time. Brooks' action was no doubt an effort to overturn the 1981 amendment's curtailment of his Act's scope. The GAO in an incomplete study stated that the Warner Amendment of 1981 did not reduce DOD ADPE acquisition time and therefore should not be extended [Ref. 24]. The Warner Amendment was extended despite Brooks' efforts.

The following closing remarks regarding the Brooks Act round out the background knowledge for the Federal ADPE manager. The Act has always had its detractors. Assessments of the Act's effectiveness are mixed. The Act's negative impact on agencies efforts to expeditiously procure ADPE is well established.

- In 1976 the House Government Operations Committee's own assessment based on numerous studies was that "though the Act had provided significant benefits, overall it had been poorly administered and inefficiently implemented." [Ref. 25]

- Robert Head of the Brookings Institute cited the following problems: lax enforcement of the provisions of the Brooks Act, difficulty in the interpretation of GSA guidelines, and the treatment of software conversion costs in the assessment of the impact of new hardware procurement actions.

- Conflicting House guidelines further confound issues. The House Appropriations Committee espousing a "Lowest Total Overall Cost" analysis incorporating system conversion costs, and the House Government Operations Committee taking an opposing position that the inclusion of conversion costs in the analysis, inhibits competition and favors the incumbent supplier. [Ref. 26]

- The 1984 Grace Commission's report: President's Private Sector Survey On Cost Control (PPSS) lambasted the effects of the Brooks Act and called for its review. PPSS found Federal ADP activities to be "disorganized and inefficient..." [Ref. 27]

- PPSS also mentioned ADP operation costs were $12 billion annually in 1984. The Commission's report stated "Congress virtually assured an end to the Government's leadership position [in the ADP arena] by passing the Brooks Act in 1966...the act merely slowed the acquisition process to an average of two and a half years to four years - by which time the computer, which may have been state of the art in the acquisition planning stage, is well on its way to obsolescence."

- Both PPSS and a September 1980 article in the Government Executive magazine also called for the thorough review and modernization of the Brooks Act in recognition of the vast changes that have occurred in the ADP arena since 1965. [Ref. 28]

J. THE PAPERWORK REDUCTION ACT (PRA) OF 1980

The PRA of 1980 implemented a curious expansion of the Brooks Act that expanded the GSA's charter to include the review of an agency's requirements and needs for information technologies, specifically prohibited actions under the original Brooks Act. The House version of the then straightforward Paperwork Reduction Act underwent a scantily reviewed modification in the fall of 1979 as Brooks added provisions governing ADP and

telecommunications to Rep. Horton's (D-NY) draft bill. These added provisions received only perfunctory hearings as the President (Carter) was pressing both the House and Senate for passage of the bill [Ref. 29]. The Senate version of the bill did not include any ADP or telecommunication provisions in it. In addition to expanding the GSA's charter to include review of an agency's requirements and needs for information technologies, the PRA also reorganized the GSA's Automated Data and Telecommunications Service, which was renamed the Office of Information Resources Management (OIRM).

K. THE PAPERWORK REDUCTION REAUTHORIZATION ACT (PRRA) OF 1986

The PRRA of 1986 is the last significant piece of ADPE procurement legislation to be presented as background information in this study. The importance of the PRRA was that it made key changes to the Brooks Act that served to expand the then eroding power of the Act. The PRRA implemented or served as the basis for the following additional changes in the Federal ADPE protest arena:

- Provided a new statutory definition of ADPE updating the dated and jurisdiction limiting terms of the 1965 Brooks Act
- Expanded GSBCA jurisdiction to all ADPE procurements - those subject to GSA delegation as well as those actually under GSA delegation authority

- Served as the basis for changes to the Federal Information Resource Management Regulations (FIRMR) pertaining to the definition of FIP/ADP/ADPE services

The updated FIRMR emphasized the application of Delegated Procurement Authority (DPA) limits to ADPE support services as well as ADPE itself.

Discussion of a Federal Circuit Court ruling in the case of Electronic Data Systems Federal Corp. v. GSBCA is pertinent to the PRRA. Among other things, provisions in the PRRA sought to reverse emerging limitations placed on GSBCA ADPE jurisdiction by Federal Circuit rulings. At the time of the limiting Circuit rulings, GSBCA jurisdiction had only recently been expanded under CICA.

The United States Court of Appeals for the Federal Circuit has jurisdiction over appeals of GSBCA decisions. In the 1986 Electronic Data Systems Federal Corp. case, the Court ruled on appeal, that the GSBCA had no jurisdiction over a procurement that should have been, but was not conducted under provisions of the Brooks Act (under GSA a granted Delegation of Procurement Authority, DPA). In other words, because the agency incorrectly proceeded on an acquisition without a DPA (when it should have secured a DPA), the procurement was not carried out under the provisions of the Brooks Act. Because the procurement was not carried out *under the provisions* of the Brooks Act, the Circuit Court ruled the GSBCA had no

jurisdiction in the protest. Statute at that time, specifically granted the GSBCA jurisdiction over ADPE protests on procurements *conducted under* the Brooks Act.

Rep. Brooks vigorously opposed this strict interpretation of the GSBCA's jurisdiction. The ruling placed a great limitation on the GSBCA's protest jurisdiction. A provision of the PRRA in effect closed the loop-hole created by the Circuit Court's ruling in Electronic Data Systems case by extending the GSBCA's jurisdiction to include procurements *subject to* GSA DPA and the Brooks Act. Rep. Brooks' defense of CICA's expansion of GSBCA ADPE jurisdiction included numerous hearings by the House Committee on Government Operations, and a large report entitled *Efforts by Federal Agencies to Circumvent the Competition in Contracting Act.*

As the types and power of ADPE increased under continually advancing technologies, the provisions of the Brooks Act (envisioned with early 1960's computer technology in mind) became more and more difficult to apply. The PRRA provided a significantly enlarged statutory definition of ADPE that updated the Brooks Act. The enlarged definition incorporated among other things:

- interconnected systems
- sub-systems
- transmission equipment technologies

- computer hardware procured for use in services provided to the government in the form of services contracts
- software
- ancillary equipment

The PRRA also removed a previous three-year limit on GSBCA bid protest jurisdiction which made the Board's jurisdiction in effect indefinite (i.e. by removing the limit on the Board's jurisdiction, the PRRA in effect, made the jurisdiction indefinite). The final impact of the PRRA was the revision and release of updated FIRMR regulations for ADPE. This revision basically adopted the PRRA statutory definitions of FIP (ADPE equipment and services). The FIRMR also clarified some ambiguous PRRA terminology such as "significant use" phraseology relating to products and services that relied upon use of ADPE. The updated FIRMR defined "significant use" as: the case where a contractual product or service could not be reasonably performed without ADPE (FIP), and the dollar value expended by the contractor on ADPE exceeded half a million dollars or 20% of the estimated contract price, whichever limit was lower.

L. A COMPARISON OF FEDERAL AND DEPARTMENT OF THE NAVY PROTEST STATISTICS

Figure 3 compares total Federal and Navy Department ADPE protest statistics for fiscal year 1985 through the first quarter of fiscal year 1991

(latest available data). Costs were awarded to the protestor in 19 percent of the Federal actions and 18 percent of the Department of Navy actions either by GSBCA decree or as a part of the settlement process. [Ref. 30] Review of the GSA 1990 ADP Protest Report yields the following Government-wide protest figures for fiscal year 1990 for Federal agencies: won 31 protests, lost 26 protests, 20 protests were dismissed by the board, 85 protests were withdrawn and 82 were mutually settled (of a total of 244 decisions). An interesting though not surprising statistic is that almost 33 percent of the protest cases occurred in the last quarter of the year. Those familiar with the dynamics of the federal budget and funding process recognize the protest surge as relating to the classic and understandable, end-of-year agency push to (legitimately) use expiring funding. The end-of-year rush is also exacerbated by "slipped" programmed procurements delayed by development/design problems and/or protest actions.

Looking at Department of Defense figures in general and Navy figures specifically, the DOD sustained more than half of the protest actions overall. The Navy led the other services with 50 protest actions closely followed by the Army with 43. The Air Force had slightly less than half the protest actions of the Navy, with 23 protests. Remaining DOD components accounted for 14 additional protests. [Ref. 31] The difference between the Navy and Army figures does not appear particularly significant. However, the fact that the Air Force had less than half the protests than the Navy warrants further

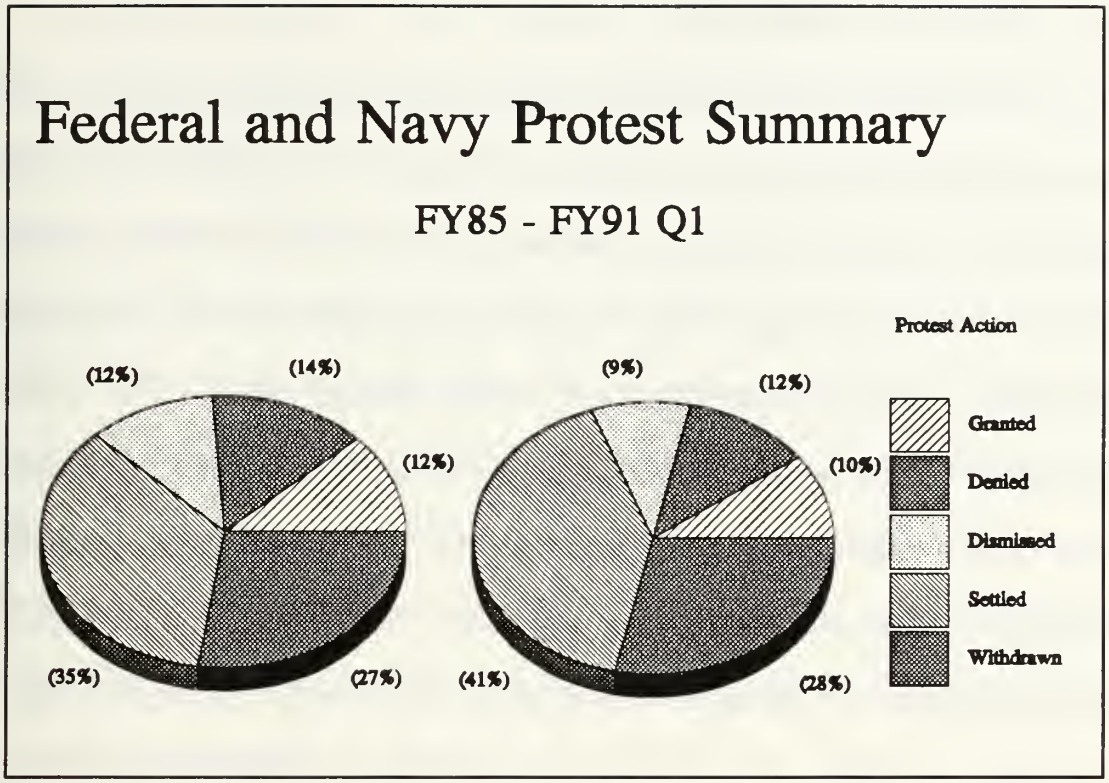

Figure 3

study. Mr. Carl Peckinpaugh, the Air Force's lead defense counsel for USAF ADPE protest actions before the GSBCA, attributes the difference, in part, to the Air Force's more centralized approach to the management of ADPE procurements and defense of GSBCA ADPE protests. Mr. Peckinpaugh believes that the Air Force's centralized approach allows the service to benefit from past procurement experience as well as build expertise in the defense of protest actions. [Ref. 32] The service's procurement expertise serves to effectively prevent many protest actions before they occur.

M. CHAPTER SUMMARY

Developing a working understanding of Federal ADPE protests requires study of the statutes and regulations that make up ADPE procurement guidelines. Understanding the concept of Congressional and agency oversight gives insight into the origins of present day statutes and procurement regulations. The growing pains experienced during the implementation of the GSBCA's ADPE protest jurisdiction have subsided, and the Board's jurisdiction over ADPE protests appears now to have reached an equilibrium. The ADPE acquisition arena is nevertheless a dynamic one. Congressional oversight continues to threaten additional statutes and regulations with each subsequent acquisition scandal or notable effort to circumvent established guidelines.

The complexity of Federal ADPE acquisition is readily apparent in the volumes of applicable statutes, regulations, and directives that must be followed by the ADPE manager. The mechanics of the protest process is equally detailed and must be dealt with by the agency in the event a protest action is filed. Agencies must be prepared to respond to protests that can be filed during virtually any phase of the acquisition process. Of all the potential protest venues, the GSBCA has proven itself to be most timely and effective.

The main impact of ADPE protests is felt in two areas, settlement and legal costs, and delays in program execution. Both of these impacts can be significant and potentially fatal if sustained at the wrong time in the budget process.

Numerous statutes were discussed in the chapter including the Competition in Contracting Act (CICA) of 1984, the Brooks Act of 1965, the Warner Amendment, the Paper Work Reduction Act (PRA) of 1980, and the Paperwork Reduction Reauthorization Act (PRRA) of 1986. CICA formed the primary basis for the filing of protests of government procurement actions. CICA as its name implies sought to foster increased competition in Government acquisitions. The Brooks Act is the oldest and likely the most important ADPE statute. The Brooks Act serves as the foundation upon which CICA, AND PRRA build. The Warner amendment placed important limitations on the scope of the Brooks Act with respect to certain DOD and Federal ADPE procurements.

Chapter III presents lessons learned from analysis of over two hundred of the more significant GSBCA ADPE protest decisions rendered between 1985 and the present. Both general and specific lessons learned for the Federal ADPE manager are offered. Some common misconceptions of protest actions are also discussed. Many of the Board's early decisions relate to issues of jurisdiction. Upon completion of the chapter, the reader should have a feel for both the character of the GSBCA, and the guidance it offers in the form of its decisions.

III. LESSONS LEARNED FROM GSBCA PROTESTS

A. GENERAL COMMENTS ON LESSONS LEARNED

While there are many sources to extract raw information pertaining to past ADPE acquisitions, finding instances of compiled, readily available lessons learned is more difficult. Study of ADPE protest proceedings, review of summary findings, survey of acquisition articles in publications targeting Federal ADPE managers, and interview of key players in past and present Federal ADPE acquisitions are potential sources of feeder information for lessons learned.

As previously stated, this study sought to develop lessons learned from over 1200 GSBCA ADPE decisions and related decisions of the Court of Appeals of the Federal Circuit (where applicable). In addition to the lessons learned, the study is intended to serve as a "protest primer" for the new Federal ADPE manager, as written from the prospective of the ADPE manager. The term "protest" is used throughout this chapter to refer to protest actions brought before the GSBCA unless discussed in the context of a Court of Appeals decision.

After studying over 200 of the more significant GSBCA ADPE protest decisions, some general impressions of the Board's character and guidance emerged. These comments are offered at face value, in a positive context.

They reflect the author's impressions after review of numerous Board decisions. The GSBCA unmistakably takes its charter seriously and seeks to carry out its review of ADPE protests (in addition to other protest actions) seriously. The Board is vigorously protective of its ADPE jurisdiction and seeks to protect and reiterate its position whenever this area is questioned. The Board previously enjoyed statutory support from Representative Jack Brooks (former Chairman of the House Committee on Government Operations) in the form of provisions in the Paperwork Reduction Reauthorization Act of 1986 (P.L. 99-500). Rep. Brooks, now Chairman of the House Judiciary Committee, nevertheless retains his interest in Federal ADPE matters recently questioning the Justice Department's handling of ADPE matters. [Ref. 33] As discussed earlier, Brooks' successor, Rep. Conyers, continues to support ADPE oversight issues.

Overall, the Board appears to take a reasonable position on a wide spectrum of protest issues and manages to support the legitimate interests of protestors while not unduly treading upon the government agency interests and intentions. Reason appears to prevail in most decisions. For example, allowances for minor procedural errors on the part of an agency can be overlooked [Ref. 34]. In a recent decision the Board even remarked "Any good lawyer can pick lint off any Government procurement...." [Ref. 35] Willing cooperation in the Board's discovery procedures and proceedings is clearly expected of all participants and raises the ire of the

Board if bad-faith, ill-intent or fraud surfaces. In the case of ViON Corp v. Army however, a protest dismissed by the GSBCA as frivolous largely due to non-cooperation, was reinstated by the Court Of Appeals for the Federal Circuit disallowing the Board's determination based upon "bad-faith." [Ref. 36]

Several issues reappear with enough frequency to indicate that lessons were not being learned from past Board decisions by Federal agencies. However, there are indications that greater emphasis is now being placed on studying and incorporating lessons learned from past Board decisions. [Ref. 37]

As trite as it may sound, a procurement diligently and competently pursued, will not likely sustain many or any protests. If ADPE procurement statutes and regulations are closely adhered to (not necessarily *perfectly* adhered to) a potential protestor is not likely to proceed or prevail with the weak complaint. The Board's track record of firm but fair handling of protest cases effectively supports both the protestor's and Government's interests. Treating the offeror/bidder "right" throughout the procurement process goes a long way toward avoiding protests. The GSA has raised this recommendation before. In summary, competence is expected of government agents, minor errors are often tolerated, and cooperation in Board proceedings is demanded.

B. SOME COMMON MISCONCEPTIONS CONCERNING PROTESTS

Before discussing specific lessons learned from the GSBCA proceedings, this is a good time to discuss some common misconceptions that exist in the ADPE procurement arena. This discussion will serve as a lesson learned in its own right.

While not diminishing the case for minimizing ADPE protests, maintaining the proper perspective is important. Review of articles in computer trade publications and informal discussions between ADPE managers leads one to list three general perceptions of ADPE protests:

- The Government loses most protests,
- Protests always result in substantial acquisition delays, and
- Most ADPE acquisitions sustain protest actions.

The good news is that these perceptions are largely not supported by fact. GSA IRMS noted in its January-March 1990 *ADP Protest Report* that it is difficult to classify protest decisions into simple win-lose categories. The Government does clearly lose 10% of the protests, settles in 40%, and "wins" dismissals in the remaining 50%. [Ref. 38] This is admittedly a simple statistic and it is difficult to gather comprehensive acquisition data. Also, this statistic is not weighted for the size, cost, or importance of these acquisitions.

Nevertheless it does serve as a reference of sorts. While the preceding statistics appear favorable, the overall number of protest actions seems to be increasing slightly.

Regarding the issue of delays, fewer than one quarter of all protests run the entire length of the GSBCA decision process. These cases average 44 workdays in length (the maximum statutory limit is 45 workdays). Finally, with respect to the numbers of acquisitions protested, fewer than 195 of some 47,488 reported ADPE acquisitions in FY 1988 were protested - slightly over four tenths of a percent. [These numbers were from the Federal Procurement Data Center (FPDC) not GSA IRMS. The FPDC receives data on all Federal procurements whereas GSA IRMS tracks primarily GSBCA decision data.]

C. SPECIFIC GSBCA LESSONS LEARNED - FROM THE DECISIONS

Upon analysis, the Board decisions fell into the following five logical categories:

- Brooks Act/Warner Amendment Issues (GSBCA jurisdiction)
- Eligibility for filing protests
- Deadlines and timeliness of filing protests
- RFP/IFB/CBD Notice requirements issues
- Evaluation/selection issues

The above categories closely relate to three primary conditions that must be met for Board jurisdiction. First, the Board must determine the procurement at issue is in fact subject to the Brooks Act. There initially existed some question regarding the exact meaning of existing statutes and regulations. Second, only "interested parties" may bring forth protests; so the Board must address the standing of the protestor. The protest must also have been filed in a timely manner. Thirdly, the protest cannot have been previously pursued at the General Accounting Office. There are other considerations which are technically oriented. For example, that a valid base alleged for the protest exists or whether or not the protest issue is moot. A more detailed discussion of the five major categories of decisions follows.

1. Brooks Act/Warner Amendment issues

The key issue in this area is whether or not the Brooks Act applies to the ADPE procurement and thus supports the Board's jurisdiction over the protest. Three sub issues apply: (1) is the procuring agency subject to the Brooks Act?, (2) if the agency is subject to the Brooks Act, does the "significant use of ADPE" criteria apply?, and (3) does the Warner amendment exemption apply? Note that the Central Intelligence Agency is afforded even broader exemptions than the DOD's Warner exemption. More recently, there has been a downward trend of Board protests dealing with Brooks Act or Warner Amendment issues.

a. Brooks Act issues

The GSBCA's jurisdiction over protested ADPE procurements subject to the Books Act was strengthened by CICA in 1984. There was a period of time where the Board's jurisdiction was tested by various protest actions either seeking relief by the Board or agencies requesting dismissal based upon non-jurisdiction. Questions regarding the interpretation of the meaning of the "significant use" criteria in determining jurisdiction had to be answered. The following paragraphs present lessons learned from the Board's decisions pertaining to "significant use" issues; the following section deals with lessons learned regarding the Warner Amendment exclusions. The decisions are presented largely in chronological sequence.

(1) "Significant use" of ADPE. An early decision in Federal Systems Group v. U.S. Postal Service answered among other issues, the applicability of the Brooks Act to a quasi-governmental agency ADPE procurement [Ref. 39]. The Board finding that the Postal Service was subject to the Brooks Act was subsequently overturned on appeal, by the Court of Appeals for the Federal Circuit [Ref. 40]. In Diversified Systems Resources, Ltd. v. Department of Energy, the Board determined that products or contracted services that necessitate significant or important use of ADPE, are under GSBCA purview, and are not exempt from the Brooks Act. The Board surmised to allow otherwise, would permit agencies to incorporate ADPE procurements into other larger procurements thus becoming a minority

position in the overall acquisition) and thereby exempt the procurement from the Act. The Board held this was not Congress' intent [Ref. 41]. In Wilcox Electric, Inc. v. Department of Transportation the Board decided that procurement involving radio transmitter equipment (for an Instrument Landing System (ILS)) was not subject to the Brooks Act despite the systems microprocessor control. However, the Board stopped short of a definitive distinction between incidental and significant use [Ref. 42].

In The Citizen's & Southern National Bank v. Treasury, Treasury argued a procurement for cash concentration and accounting services was a services issue and not an ADPE issue. The Board found otherwise stating if a procurement requires a significant amount of ADPE to produce a product or service, it falls under the Brooks Act. The Board strongly recommended an agency in doubt of the applicability of the Brooks Act should contact the GSA for an interpretation, and if appropriate secure a DPA. [Ref. 43]

In Mandex, Inc. v. Department of State, the Board offered a three factor approach for determining Brooks Act based jurisdiction:

- Were ADP support services important to successful performance?
- Did individuals involved need a background in computer science?
- Would ADP be required in the performance of the Contract?

This case was a procurement for contracted engineering services to conduct TEMPEST (emissions security) surveys. The Board found while the services involved surveying ADPE emissions, it did not meet any of the three factors; thus the Board had no jurisdiction. [Ref. 44]

The following "significant use" decision in Sector Technology v. Department of Defense sheds more light on the Board's thinking in this area. In the context of the services required in the operation of a computer based security system, the Board found:

> "...requirements for services which use ADPE but do not involve ADP support or maintenance such as secretarial services which entail the use of word processors - are not to be construed as involving the significant use of ADPE... The mere entering, accessing, and deleting of data into an existing automated database and manipulation of that information by invoking pre-programmed commands is insufficient to bring a procurement within... the purview of the GSBCA by virtue of the Brooks Act." [Ref. 45]

A strange and largely unimportant "significant use" case is found in DRM & Assoc. v. Immigration and Naturalization Service. DRM sought to file a protest of a solicitation that did not include any reference to ADPE, but citing Board jurisdiction due to the use of ADPE in the performance of administrative services under the contract. The Board when offered this opportunity to apply the "significant use" criteria refused to do so [Ref. 46]. The Norwood & Williamson v. Department of Health and Human Services protest decision declined to accept jurisdiction based upon "substantial use" in a case where services solicited use ADPE but are not

themselves ADP services (a solicitation for Computer Aided Design services). [Ref. 47] In another "significant use" issue, the Board refused a protest pleading jurisdiction in a case soliciting warehouse space to store ADP data tapes [Ref. 48].

(2) Contractor as Government Agent. The question of the applicability of the Brooks Act to an ADPE procurement action undertaken by a contractor, acting as an agent for an agency, was answered in 3D Computer Corp. v. Department of Commerce. The Board determined that an agency cannot avoid the statutory and regulatory requirements which apply to a Brooks Act procurement by permitting a contractor to handle the procurement actions [Ref. 49]. In United Telephone Company of the Northwest v. Department of Energy (DOE), The Board found Brooks Act jurisdiction in the procurement of an integrated telephone system by a contractor operating under a contract for maintenance and operations (M&O) of a DOE site. The M&O contract included requirements for providing information resource management. The Board found "significant use" in the procurement because the site support functions required significant use of the integrated telephone system. Another issue of Westinghouse acting as an agent for DOE, was handled in much the same manner as previous protests [Ref. 50].

(3) Services Contracts. With regard to significance of use in an ADPE services contract, National Biosystems, Inc. v. Department of the Army offers guidance. The Board determined jurisdiction due to the solicitation that emphasized data systems experience in providing services that included the preparation of documents for transmission to another government agency [Ref. 51]. Another procurement agent issue arose in International Technology Corp. v. NASA. The board found a delegation of procurement authority (DPA) is still required in an agency contractor relationship. This case dealt with a protest filed as a result of evaluation and award improprieties conducted by Boeing Computer services acting an a micro-computer procurement agent for NASA [Ref. 52]. A slightly different jurisdictional issue was at issue in International Business Machines, Inc. v. General Services Administration where the Board found jurisdiction in determining the consistency of a Federal Acquisition regulation (FAR) pertaining to the Buy American Act. The Board cited its broad authority to review regulations for statutory consistency [Ref. 53].

(4) ADPE Definition. Another Brooks jurisdictional issue relates to the definition of ADPE. In The Electronic Genie, Inc. v. Defense Logistics Agency, the Board found that a procurement of telephones as telecommunications equipment are within its jurisdiction. [Ref. 54] In Vikonics, Inc. v. Department of the Army, the Board found an ADPE based

security system was within its jurisdiction even though the system was part of a much larger construction contract [Ref. 55].

The PRRA definition of ADPE largely cleared up existing confusion surrounding the exact statutory meaning of ADPE. See the discussion of the PRRA in Chapter II.

b. Warner Amendment protest issues

The following paragraphs pertain to lessons learned on Warner Amendment exclusion protests. In Cyberchron v. Department of the Navy (DON), TBC Corp. v. DON, and TBC Corp. v. Department of the Air Force, the Board decided the applicability of the Warner amendment exclusion based upon the intended use of the ADPE. The fact that the ADPE consisted of commercially available equipment did not make it ineligible for the Warner exclusion [Ref. 56]. In Systems Management American Corp. v. Department of Navy, the Board disallowed the Navy's claim that a clearly routine administrative ADPE based system was exempt under the Warner amendment provisions despite the project manager's belief of exemption. Thus any claim to Warner exemption should be well substantiated before proceeding with the procurement [Ref. 57].

A decision related to the Warner exemptions also conveyed the Board's impatience with overly technical protests. In this case Electronic Systems Associates protested a U.S. Air Force SDI related procurement that correctly claimed the Warner exemption on the grounds that SDI was not a

weapons system by virtue of the standing ABM treaty [Ref. 58]. In Racal Information Systems v. Defense Communications Agency, the Board disallowed a Warner exemption claim in the case of general ADPE/communications equipment (modems) whose specific use could not be substantiated by the agency [Ref. 59]. The Warner exemption was revisited in Computer Sciences Corp. v. Department of the Army where the Board determined that a largely Warner Amendment oriented acquisition does not fall under the Board's jurisdiction even if the equipment might be put to a few additional uses that are incidental to the overall needs [Ref. 60].

Additional insight into the Board's thinking in assessing Warner Amendment exemptions is found in Information Systems & Networks Corp. v. Department of the Navy. The case pertained to a terminated (for default) contractor providing base perimeter security system installations at Naval Air Stations. The Board found no jurisdiction due to a Warner Amendment exclusion protecting a procurement in support of a direct military mission. The Board stated that it takes Congressional mandate and specific mission requirements into consideration when applying Warner exemption rules. In this case Congress had directed upgraded security in a heightened terrorist threat environment [Ref. 61]. Again using its intended use criterion, the Board found the Warner exemption (intelligence) applied to an Air Force

procurement of facsimile machines intended for the use in transmitting drug interdiction intelligence data in support of DOD's war on drugs tasking [Ref. 62].

2. Filing of protests - eligibility and basis for filing

This second decision category covers eligibility. In order to file a protest before the Board, the protestor must be eligible to do so. There are two important conditions in this area: (1) the allegation of a violation of regulation, statute, or conditions of procurement authority (DPA) on the part of the procuring agency and, (2) the protestor must be an "interested party". With regard to an alleged violation, the Board adds, "[The allegation must] ...rise above the level of a mere suspicion." [Ref. 63] [Ref. 64] If the protestor raises a valid (non-frivolous) protest, agency requests for dismissal will be denied by the Board.

The second determinate requires the party filing the protest to be an "interested party" in the procurement action. As defined in statute [40 U.S.C.] an interested party is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." [Ref. 65] Should a protestor be determined not to be an interested party, the Board no longer has jurisdiction over the matter.

a. Interested party status

Ascertaining interested party status can be somewhat confusing and difficult. This likely explains the many decisions that have been rendered in this area since the advent of the Board. In an early and significant case Diversified Systems Resources, Ltd. v. Department of Energy, the Board asserted it's right to review contracting officer decisions alleged to violate a statute or regulation of a Brooks Act procurement [Ref. 66]. The Board rendered this decision while acknowledging that statute stipulates protests can only be filed based upon a solicitation, proposed award, or award of a contract. Diversified Systems, initially awarded a contract that was subsequently terminated due to agency determined deficiencies in the underlying procurement was afforded interested party status. The GSBCA further asserted its power to "suspend, revoke, of revise extends to cases requiring reinstatement of improperly terminated contracts. Thus "interested party" status is not limited only to strict reading of statutory guidelines.

MCI Telecommunications Corp. v. General Services Administration deals solely with the issue of protest standing. In this case, MCI was not, in fact an offeror in the acquisition at issue but protested the award to AT&T. The board determined that MCI couldn't benefit from the outcome of the protest action regardless of what it may have been (not being an offeror), thus could not be considered an interested party [Ref. 67]. The Board's decision was upheld in an appeal to the Court of Appeals for the

Federal Circuit in MCI Communications v. U.S. The Court used a simpler test for "interested party" status which was: "The solicitation must be outstanding when protested in order for those having not yet submitted bids to be considered prospective bidders on the proposed contract... the opportunity to qualify either as an actual or prospective bidder ends when the proposal period ends...." [Ref. 68] The fact that this test is provided by an Appeals Court increases its standing relative to one offered only by the Board.

Simply having an offer before an agency alone is insufficient grounds for establishing an economic interest. An offer needs not only exist but must be technically responsive. [Ref. 69] [Ref. 70]

b. Interested party - "next-in-line" criteria

Another interested party issue is the "next in line" criteria. For the protest to be considered valid, the protestor must also be next in line to receive award if the protested issues prevail. The key point here is that the protestor need not be numerically next in line for the award. The protestor must however successfully challenge all intervening offers to establish the next in line status. In the event the existing intervening offers are valid and responsive, the further removed protestor cannot advance his relative position. [Ref. 71] This case pertained to a sealed-bid scenario. Note in Unit Data Services Corp. v. Department of Veteran's Affairs the Board elected to apply the next in line (lower bidder) rule to a negotiated procurement [Ref. 72].

A complicating factor in the "next in line" rule is found in the Unit Data Services Corp. protest just mentioned. In this case the responding agency sought dismissal of the protest citing Unit Data's lack of next in line status. The problem was that the Unit Data protest included a count bringing into question technical evaluation issues. The Board determined that if the technical evaluation was in question the protestor could (possibly) be the next in line. Thus the board elected to proceed with the hearings. As a result of the initial hearings, the protestor determined that it was not, in fact, next in line and amended the protest to question the eligibility of an intermediate offerors protest to reestablish Unit Data's next in line status. In a turn of events, Unit Data subsequently failed to establish the ineligibility of the intermediate offer and accordingly lost its next in line status and standing to raise a protest. Again the significant item to remember is the Board's use of the next in line test in a non-sealed bid scenario (this was a negotiated procurement).

In a slightly different "next in line" case, Data South Computer Corp. V. Department of Veterans Affairs, the Board noted that post-award protest standing requires both the allegation that the award was improper, and that were it not for the error in award, the protestor would have received the award. Since Data South did not have a responsive offer active with the Department (their offer was previously rejected as non-responsive for schedule reasons), the protest was rejected by the Board. [Ref. 73]

Closing out the "next in line" cases is International Data Products v. Department of Labor. This is a straight forward application of the "next" rule where two intervening offers, one of which was valid, disallowed the protest. [Ref. 74]

In summary, there must be both a sound *basis* upon which to file a protest, and an *eligibility* to file a protest. The proper basis is an allegation of a violation of regulation, statute, or DPA. With respect to eligibility, there are two main criteria for determining eligibility for filing a protest: (1) "interested party" status and (2) "next-in-line" status.

3. Deadlines and timeliness of filing protests

GSBCA proceedings are characterized by many very specific deadlines for accomplishment of aspects of the protest process. These deadlines contribute positively to the characteristic timeliness of the GSBCA venue of protest. The Board is generally very strict in the application of filing deadlines. Chief Judge of the GSBCA, Leonard J. Suchanek,points out that the ten working day limit rule (5(b)(3)(ii)) for filing a protest "[Is necessary] to avoid undue disruption of the procurement process by requiring vendors to file protests promptly." [Ref. 75] The Board also points out that "all parties are entitled to know with some certainty when cases may be brought and when they may not." The ten day protest filing deadline is not however, the sole timeliness issue present in protests. Agencies need to be timely in their adverse notification of unsuccessful bidders to avoid unnecessary protests

seeking to recover unnecessary costs incurred as a result of the delay in notification. Additionally, agencies need to be timely in filing their motions to dismiss a protest for untimeliness.

From the chosen perspective of the ADPE manager, these protest filing deadlines are important to the extent they limit the windows of vulnerability for protest action. Procurement actions must still be pursued accurately and effectively as these filing windows may not fully protect errors in agency actions. Limited cases do exist where, for very special reasons, the deadlines were constructively modified by the Board to allow acceptance of the protest that, upon initial interpretation, misses a deadline. These exceptions are just that, exceptions - and infrequent ones at that (see Rocky Mountain Trading Company below).

Rejections of protests due to lack of timeliness is not uncommon based upon the cases reviewed in this study. As discussed above, the board's reasons for strongly supporting the ten day limit is to maintain the GSBCA protest venue as an effective and timely alternative to more expensive and drawn out protest options such as the courts. While the ten day limit is relatively inviolate, the specific start time of the filing deadline can be an issue. In Artais, Inc. v. Department of Transportation, the ten day limit was deemed to begin not with the bid opening date, but with notification of adverse action (e.g. intended award to a specific other bidder) in the case of a protest

based upon non-responsiveness of an offer. As implied in Artais Inc., the issue of notification of adverse action is an important one in establishing the filing clock. [Ref. 76]

PCA Microsystems v. Department of the Army resulted in a Board determination that an untimely notification of award to disappointed offerors (adverse action) in the absence of harm, was not a basis for a successful protest. Had harm been incurred the protest could be valid at least for the issue of cost recovery. [Ref. 77]

Agencies also need to be timely in their filing of motions to dismiss untimely protests. In Rocky Mountain Trading Company v. Federal Aviation Administration, the Board refused an untimely agency motion to dismiss the protest stating that timeliness is not a matter of jurisdiction, but of discretion. This implies that the Board may opt not to dismiss for untimeliness unless the respondent has made a timely motion to dismiss. [Ref. 78]

Protests in the solicitation phase cannot be filed right at the time proposals are due. GSBCA rule 5(b)(3)(i) stipulates that a

> "...protest based upon alleged improprieties in any type of solicitation which are apparent before bid opening or the closing time for receipt of initial proposals shall be filed before bid opening or the closing time for receipt of initial proposals."

In the case of Morton Management, Inc. v. Department of Health and Human Services, the procuring agency stipulated that Agency protests must be filed prior to the closing for receipt of proposals. The Board's rule contemplates that

the respondent must be informed of potential ambiguities in a solicitation before and not simply at the time of receipt of proposals [Ref. 79]. Protests during the solicitation phase must be filed before the closing date for receipt of proposals. The reason for this rule is to allow all parties to the solicitation to benefit from any clarification of ambiguities or errors in the solicitation. In the case of Morton Management v. Department of Health and Human Services, a protest filed the day proposals were due and not the day before, was rejected as untimely [Ref. 80]. The Board determined that Morton perceived the ambiguities well prior to the filing deadline and could have raised the issues in time to benefit the other offerors. Federal Systems Group v. Department of the Army and Electronic Associates, Inc. v. Naval Research Lab resulted in a similar protest rejection due to untimeliness (filed after receipt of offers). [Ref. 81] [Ref. 82]

The Board is very strict in its enforcement of the ten day filing rule. Missing the filing deadline by even minutes can be grounds for dismissal as untimely. The following are examples of more obvious cases of untimeliness: Advanced Control Systems v. Department of the Interior (44 days after adverse notice) [Ref. 83]; Denebe Robotics, Inc. v. Department of the Interior (filing in excess of ten days) [Ref. 84]; KSK Enterprises, Inc. v. Department of Health and Human Services (filing in excess of ten days) [Ref. 85]; Computer Dynamics, Inc. v. Executive Office of the President (missed Board Office closing by one and half hours) [Ref. 86]; Cyber

Digital, Inc. v. Department of Agriculture (filing in excess of 23 days) [Ref. 87]; R&D Office Machines Sales & Service, Inc. v. Department of Health and Human Services (filing in excess of 12 days) [Ref. 88]; and System Automation Corp. v. Department of the Army [Ref. 89].

The constructive nature of the ten day protest filing limit is best illustrated in the case of General DataComm Systems, Inc. v. Defense Communications Agency. In this sequence of protests commencing with an Agency protest (as a precursor to a GSBCA protest) filed within ten days of an announced award to another bidder, the agency took one and a half months to rule adversely on the protest. The issue was then raised with the GSBCA within ten days of the adverse ruling and still determined to be a timely protest. The Board stated that the FAR encouraged agency protests prior to Board protests [Ref. 90].

In summary, there are specific timeliness requirements pertaining to the filing of protests. The ten day rule is necessary to ensure the GSBCA can maintain the characteristic timeliness of its decisions. The deadlines are also necessary to allow the Government to proceed with its business. The Board's enforcement of the ten day rule, while strict, is not arbitrary. Constructive extension of the limit notably in the case of agency protest proceedings has been allowed. Nevertheless, the Government can expect the filing deadline to be strongly enforced.

4. RFP/IFB/CBD notice requirements issues

Numerous protest decisions relating to errors in agency drafting and interpretation of specifications in both sealed bid and negotiated procurements were reviewed in the conduct of this study. The cases and lessons learned will be presented in approximate chronological order of the respective GSBCA decisions. Decisions pertaining to evaluation criteria and award criteria which could justifiably be contained in this sub-section are deferred until the "Evaluation/Selection issues sub-section.

a. RFP issues

In a word, specificity is the issue. Generally highly specific requirements, terms, and specifications are desirable. RFPs shouldn't be unduly restrictive of competition or protests will likely result. However, agencies should be careful to leave their evaluation and contracting officials maneuvering room when the ultimate selection must be made. Avoiding the use of overly structured bid/offer evaluation criteria is one example of maintaining maneuvering room. Another example is to stipulate specific offer evaluation areas, but to avoid assigning strict weights to each area. In this manner, offer evaluation criterion could be listed in relative order of increasing (or decreasing) importance.

A primary decision is the proper type of procurement to pursue. When selecting the appropriate procurement method to pursue (e.g. a schedule buy versus a competitive procurement), the agency must perform an

appropriate analysis of best suitability. [Ref. 91] As an example, consider a limited quantity, straightforward procurement of ADPE. Assume the ADPE to be replaced are elements of an existing system, and that no design or development work is required. Such a procurement lends itself to a schedule buy. On the other hand, consider a more complex procurement involving variable quantities, and development and design requirements. In this example, a schedule buy would be a less likely choice. Expediency may also be a consideration in choosing the acquisition strategy. Competition often comes at the cost of time. Schedule buys can simplify the procurement process but may not yield as much price (or other) competition as a competitive procurement.

(1) RFP requirements. RFPs should accurately state an agency's actual minimum requirements [Ref. 92]. The Board will support an agency's statement of minimum needs in the face of a protest if the needs are stated with sufficient clarity [Ref. 93]. Within the RFP, the Statement of Work (Section C of the RFP) must be consistent with the Evaluation Criteria (Section M of the RFP) [Ref. 94].

In Pacificorp v. the Army Corps of Engineers, a seemingly clear equipment specification in the RFP overlooked another potential solution to agency requirements. The solicitation sought a mainframe central processing unit (CPU) that used air-cooling, as chilled water was not available at the site. Pacificorp offered a unit that incorporated its own coolant system,

although not air-cooled. The agency rejected the offer as non-responsive but later admitted its error before the Board. The Board directed the termination of the contract but did not direct further corrective action. In this case, Pacificorp's less desirable solution could not be eliminated due to the need as stated in the RFP. Be careful to state your needs to exclude any proposed solutions that you definitely do not deem appropriate [Ref. 95]. Furthermore, if your solicitation isn't clear despite your best intents, when faced with an offeror who has questions on an aspect of the RFP, it is best to clarify that aspect of the RFP than to let the issue be raised later as a protest issue [Ref. 96].

Be cautious of your specification being characterized as too restrictive. The Board will not support overly restrictive specifications that cannot be justified [Ref. 97]. Use of "all or none" provisions compromises competition to the extent the Board will not support it [Ref. 98]. In the interests of competition, the Board interprets issues of solicitation requirements "... in the least restrictive manner possible given the situational context." [Ref. 99] The issue of restrictiveness carries into the use of "brand-name-or-equal" criteria, a mild restriction on competitiveness, which is allowed if justified. "Brand name or equal" procurements may require vendors desiring to bid "equal" products to make clear statements as to how their product meets the agency's minimum needs. Conversely, the vendor should

not have to guess at the essential characteristics of the required equipment - when questioned the agency should provide additional detail requested of the offeror [Ref. 100].

Software licensing protests were discovered several times in the course of this study. Solicitations should be very explicit in laying out software site licensing requirements to preclude mis-understandings and protests [Ref. 101]. Solicitations can expressly require unlimited licensing for most software and prohibit licensing based upon the number of users [Ref. 102].

One final note of a general nature, don't engage in oral solicitations despite unusual and compelling urgency in ADPE arena. Oral solicitations are solicitations that are conducted orally, often by phone, seeking offers/bids on a contractual requirement. The evaluation and selection process is generally informal and loosely structured. ADPE procurements by their very nature tend to be technically complex and not suitable for oral solicitations. In ViON Corp. v. Defense Logistics Agency (DLA), the DLA attempted to award a mainframe procurement based in initial offers with no discussions or BAFOs . One offeror, Pacificorp Capital, did not receive all the solicitation information it required to complete its offer. The contracting official engaged in clarifying discussions with Pacificorp (in violation of the terms of the solicitation). The Board directed award to ViON based upon its high rating among the initial offers. The Pacificorp offer was deemed ineligible for award

since it could not be evaluated as originally received. This case illustrates the difficulty in dealing with oral procurement of ADPE. The Board also noted that oral solicitations were fraught with peril. Oral solicitations and contracts have their place but rarely in the ADPE arena. [Ref. 103]

(2) Commercial availability/current production issues. Numerous decisions clarified issues relating to commercial availability clauses in solicitations. It is best to define terms used in the solicitation if there is a chance they may not be interpreted in the manner intended. The following are summaries of Board decisions.

RFP's can specify and differentiate between "in current production" as a more stringent availability standard than "announced for marketing purposes." [Ref. 104] With respect to commercial availability, if an RFP states scheduled installation at a future date, the offeror may offer equipment that will be available at the time of installation. The Board does not interpret commercial availability to mean commercially available at the time of the award unless the RFP so states [Ref. 105].

"Technology available" does not equate to "equipment available" for bid/offer purposes. The Board draws a distinction between commercially available technology and as opposed to equipment that is available. At least three protests have been sustained in this area. [Ref. 106]

(3) Standards and testing. Standards must be selected, cited and clarified with care. Standards do vary between standards organizations, and with the version specified. An ADPE example of this refers to telecommunications standards. Referenced telecommunication standards need to clearly, accurately, and completely describe an agency's requirements.

Specifications must be developed using market research (IAW FAR) to preclude ambiguous, confusing specifications, and specifying equipment specifications that cannot be currently met by existing equipment [Ref. 107].

The Board has allowed some leeway in the intent to test as contained in a solicitation. Stated intent in the RFP to conduct live testing does not require an agency to do so if other means of assessing technical acceptability existed [Ref. 108].

(4) Technical enhancement and excellence. RFPs may include technical enhancement clauses as part of a pre-existing mandatory use services contract if the nature of the enhancement is contemplated in the language of the solicitation and is within the scope of the underlying contract. An agency is not required to enter into a contract that would become technologically obsolete [Ref. 109].

One often assumes that minimum standards and costs drive all procurements. This is not true except in the procurement of the most basic

of services and material. The Board notes that it is entirely permissible to solicit technical excellence i.e. more than the minimum requirements [Ref. 110].

(5) Best and Final Offers (BAFOs). Numerous decisions discussed many different issues dealing with BAFOs. Communications restrictions, offer modifications and cancellations were all addressed. There are limitations on the amount of communications that can take place between the contracting officer and the offeror in the case of BAFOs. Caution should be exercised when conducting agency-offeror communications after receipt of BAFOs [Ref. 111]. Post-BAFO discussions with offerors should be avoided [Ref. 112]. In EDS Federal Corp. v. Federal Energy Management Agency, the Board offers additional guidance in allowable post-BAFO discussions [Ref. 113]. In the EDS decision, the Board differentiated between clarification and discussion. Clarification is a simpler communication whereby specific additional information pertaining to an offer is requested to assist in evaluating the offer. Discussion is a more involved communication that allows the offeror to support or revise their proposal. An agency must specifically restrict offer areas to a specific problem area in the solicitation of new BAFOs, otherwise the old BAFOs may be changed in their entirety [Ref. 114]. Finally, BAFOs should not canceled or additional rounds initiated unless the situation truly warrants it [Ref. 115]. Violating this recommendation only invites protest actions.

(6) Amendments to solicitations. Protests arise not only with the original solicitation, but also with amendments. Issues include additional response time, and maintaining competition. All amendments should be made in writing and be properly communicated to potential offerors. Claims of implicit amendments to an RFP are invalid. The only valid amendments to an RFP are in writing [Ref. 116]. A reasonable response time extension to the RFP can be expected by offerors in the case of a RFP amendment. For example, an amendment made within 24 hours of the original proposal deadline demands a submission extension. If sufficient time isn't provided, the Board is likely to direct it [Ref. 117]. Amended solicitations may restrict proposal response times to reasonable time frames, and the period for questions may be omitted [Ref. 118].

It is not improper to amend a solicitation to keep offerors in competition as long as the amendments reflect the legitimate requirements of the government. This is not "technical leveling." Briefly, technical leveling is bringing an offeror's offer to the same level as another offeror's offer either through discussions or providing suggestions as to how to improve an offers technical design. With respect to RFPs and use of evolving industry standards and software, these standards should not be cited without qualification and explanation as to the agency's exact requirements. The Board has found that an agency should "... say what it means and be held to mean what it says..." [Ref. 119]

(7) Cancellation of a solicitation. It is permissible to cancel a solicitation if the agency needs have changed. The cancellation should to be done in a responsible and reasoned manner. The Board has recommended (but not required) that offerors must be kept appraised of the status of the acquisition.

In the case of Computer Systems & Resources, Inc. v. Department of Commerce, the agency's actions were found to have bordered on mistreatment of the protestor. Had the situation been worse, the protestor may have received costs associated with the solicitation and protest. The FAR requires the cancellation and resolicitation of a solicitation that has substantially changed and requires a complete revision. An agency possessing a singular responsive offer in such a situation revised the solicitation and reopened the solicitation but did not cancel the original solicitation. Since competition had not suffered, the Board did not reverse the agency's actions, but noted the deficiency. [Ref. 120]

If an agency has a weak but valid argument to cancel a solicitation, it may do so. However, a protest action may follow from a participating offeror. Before releasing the solicitation, estimates of required services or specifications and requirements should be carefully thought through [Ref. 121]. Protestors cannot force reversal of an agency cancellation of a solicitation as long as the cancellation is supported by good reasons [Ref. 122] [Ref. 123].

(8) Requests for Quotations (RFQs). In the context of RFQs, a quotation is not considered an offer and cannot be the basis for a binding contract [Ref. 124]. Formal written communications both in soliciting offers and in response to RFPs are the only sound means of contract management.

(9) Pricing issues. Only a few decisions pertaining to pricing issues were found. The appropriateness of pricing data and applications of corrective factors to pricing in the evaluation process were issues that appeared in the decisions. In one decision it was found that firm fixed prices shouldn't be called for on a maintenance contract that includes equipment that isn't fully described in the solicitation. To do so causes offerors to guess at maintenance prices on unknown equipment and puts the contracting official in a position where he is unable to select an offeror as most advantageous to the government [Ref. 125]. In another decision, it was found that a solicitation cannot require cost and pricing data as a requirements item unless inadequate competition exists [Ref. 126].

b. Invitation for Bids (IFB) issues

The IFB decision category had fewer lessons than the RFP or solicitation categories. In general, the lessons paralleled RFP lessons. Specific page length limits can be placed on IFB responses and enforced at government discretion. A stated intent to use mixed contract types (e.g. fixed price or cost

plus) does not bind the government to accept/require contracts of that type [Ref. 127]. In Commerce Business Daily (CBD) schedule purchases, the synopsis must state up-front an agency's minimum needs in order to ensure equal competition among offerors. An agency cannot reopen negotiations with particular bidders after the opening of the sealed bids occurs. This action is prohibited in both routine IFB procurements as well as two-step procurements [Ref. 128].

General guidelines pertaining to specifications/characteristics of solicited equipment appears to apply to software as well. Invitations for Bids (IFBs) listing specific software, in the absence of specific make model/brand name or equal clause, mandates the IFB listed software [Ref. 129]. In other words, if a specific software package is listed in the IFB, it is not necessary to use the specific make model/brand name or equal clause to require the bid to offer that exact software.

Finally, the cancellation of an IFB is allowed in the event the end of the fiscal year approaches and funds expire and are no longer available for obligation [Ref. 130].

c. Commerce Business Daily (CBD) notices

Board decisions pertaining to CBD notices were also relatively few in number. Most protests were concerned with the splitting of proposed procurements or the incompleteness of requirements in the CBD notice. All

information/costs the agency needs to evaluate responses should be solicited in the CBD notice [Ref. 131].

Several cases involved GSA schedule procurements. It is allowable to order a mix of GSA schedule items after a CBD proposed schedule buy, and then issue a solicitation for other items on the initial proposal, if the analysis of schedule prices for certain items is unfavorable [Ref. 132]. In a similar situation, (IBM v. Department of Justice) the Board reaffirmed an agency's right to partially or wholly convert an announced schedule buy to a competitive procurement [Ref. 133]. In the case of a CBD notice to purchase schedule name-brand equipment, the Board has reserved the authority to direct an alternate procurement if it determines that the alternate procurement is the proper corrective measure [Ref. 134]. Failure to mention all requirements in CBD notices of schedule acquisitions was also noted as a problem.

5. Evaluation/Selection issues

A large portion of the 200 GSBCA cases reviewed addressed issues surrounding the conduct of evaluations and the award of contracts. These occurred primarily in the post-award phase of the procurement process. Agencies often reversed awards in response to real or threatened protests only to find the initial awardee filing a subsequent protest to reinstate the award. The manner in which proposals/bids are evaluated, and the post-award phase deserve a significant amount of managerial attention to avoid protests. A

single sentence can summarize the lessons learned: *Know and follow your RFP guidelines, treat all offers/bids uniformly, and award contracts in accordance with your evaluation criteria.* As simple as this guidance may sound, many agency procurements violated these basic premises and incurred protest actions.

Additional evaluation issues included interpretation of "brand name or equal" clauses, least cost versus technical superiority, and cancellation of awards. Untimely notification of disappointed offerors was also an issue that may result in the assessment of cost penalties to an agency. Several specific areas dealing with evaluation and discussion of selection are covered in the following paragraphs.

a. RFP evaluation criteria must be followed

AT&T Communications, Inc. v. GSA is the first of many cases emphasizing that RFP evaluation criteria must be followed. This case stressed that evaluation criteria needed to be applied to uniformly to all sites of a multi-site award [Ref. 135]. The issue of uniform application of evaluation requirements applies not only to all sites in a multi-site procurement, but more importantly extends to the evaluation of all offerors in an given procurement [Ref. 136]. Two cases (The Chesapeake and Potomac Telephone Company v. Treasury , and Compuware Corp. v. OPM) typified major procurements where agencies did not follow their evaluation criteria as stated in their solicitations [Ref. 137] [Ref. 138].

In another case, the Board stated that agency evaluators must "intimately" know their solicitation and evaluation criteria and must evaluate offers in accordance with those criteria [Ref. 139]. In the case of Contel v. USAF, the source selection administrator had not even read the solicitation's evaluation and award guidelines, and selection documentation did not support the selection decision. Again the Board reiterated the evaluation and selection *must* be conducted in accordance with the solicitation [Ref. 140].

In both Contel v. USAF and Anacomp/Datagraphix v. Army, the Board emphasized that technical evaluation criteria should be as complete as possible, the Statement of Work must be consistent with the evaluation criteria, and that clear technical evaluation criteria will prevent surprise (and the resulting protests) at debriefings of offerors. [Ref. 141] [Ref. 142]

b. Evaluation criteria should be fully disclosed

Not only must evaluation factors be followed, they should be fully disclosed to preclude the filing of protests. However, the Board did note in R.S. Carson & Assoc. v. Department of Agriculture that less than full disclosure was not grounds for a successful protest in the case of an inferior offer [Ref. 143] [Ref. 144]. Alliant Computer Systems v. Navy reiterated "the important thing is to make clear the basis upon which the award is to be made." [Ref. 145]

The need to fully disclose evaluation criteria extends to specifying how and when validation of equipment will take place (e.g. after bid opening and prior to award, or at bid opening based upon listing of DOD validated systems) [Ref. 146]. Rocky Mountain Trading Company v. Army involved a CBD schedule purchase solicitation which did not clearly spell out the salient characteristics of the equipment to be purchased. The Board refused to allow the agency to reject lower cost offers for failure to meet requirements that had not been specified as salient [Ref. 147].

c. Flexibility of evaluation and selection criteria

Flexibility of evaluation and selection criteria is an important issue for agencies. The ultimate selection/award will be a direct result of the criteria if they are followed properly, or will ultimately drive the selection/ award in the case of a protest action [Ref. 148]. CRC Systems, Inc. v. Environmental Protection Agency provides the lesson that evaluation criteria should be clearly stated in the RFP. In this case, evaluation and selection flexibility was also an issue.

Awarding to the next lower cost offeror possessing a technically superior solution, rather than to the least cost-low technical offer, does not present a problem if the agency exercised forethought in drafting the evaluation criteria. In order to do so, the evaluation criteria should be drafted to allow selection based upon factors other than cost alone. It is entirely possible to write evaluation criteria so clearly specific that there is no

flexibility in the selection process. It is important to structure the evaluation criteria such that the contracting official has some discretionary leeway to seek out the best solution for the agency's needs. Overly structured evaluation criteria are not in the best interests of the Government [Ref. 149]. In another CRC Systems protest, the Board supported an agency's flexibility in assessing technical and price trade-offs as supported in the solicitation criterion. It has also been noted that the selection documentation is an important factor in backing up the selection decision [Ref. 150].

Flexibility was again an issue in Alliant Computer Systems v. Navy. Rigid point-scoring systems incorporating price adjustments based upon technical scores were found to be a source of protest problems. The Board offered general selection guidance as follows: (1) the award should be made to the lowest cost, technically acceptable offeror, and (2) the selection official should be allowed to make a reasoned decision based upon technical/price trade offs. The solicitation evaluation and selection criteria should be drafted such that these guidelines are supported. Clearly, overly restrictive and specific criteria are as undesirable as vague criteria [Ref. 151]. While flexibility is an important issue, contracting officials cannot reject evaluation findings or specialist's recommendations "out-of-hand." A reasoned and documented basis for rejection of offers must be provided [Ref. 152].

d. Importance of documenting agency selection decisions

Another evaluation/selection issue deals with the importance of properly documenting an agency's selection decision. Proper documentation cannot be over-emphasized. Many agencies have either successfully responded to protests or lost protest actions as a result of adequate or inadequate documentation. [Ref. 153] [Ref. 154] [Ref. 155] [Ref. 156]

In Honeywell v. USAF, a well reasoned and well documented decision in evaluation and selection assured the successful agency response to a protest. Referring again to the issue of incorporating flexibility into the solicitation, the agency solicitation stated areas between which a trade-off analysis would be looking (technical, cost, and management). The solicitation listed only the relative order of importance and did not supply specific weights to the analysis. This allowed the agency un-protestable flexibility to exercise its selection discretion. Honeywell's offer while the lowest priced, was technically inferior to the awardee's offer [Ref. 157].

e. Uniform treatment of all offers

An agency must evaluate all offers in accordance with the solicitation guidelines. This includes requiring contractors to provide forthright offers. The Department of Energy allowed an offeror to knowingly participate in a "bait and switch" scheme with regard to proposed personnel supplied in a services contract. The offeror intended to hire-away the

incumbent contractor's personnel, but offered resumes of its own personnel in the offer. The Board reversed the award, refusing to allow the agency to participate in such a scheme that effectively alters the contract requirements [Ref. 158]. PRC v. GSA also emphasized the need to apply RFP requirements equally and consistently to all offerors [Ref. 159]. In this case, the agency did not apply personnel cost evaluations equally to all offers. The agency questioned personnel costs reflected in PRC's initial offer as unreasonable low but did not question even lower costs reflected in an initial awardee's offer. The Board ordered termination of the contract and evaluation of the remaining contracts.

f. Award in accordance with your RFP

The basic tenant "award only in accordance with provisions of your solicitation" is a recurring theme in the GSBCA decisions. [Ref. 160] In spectrum Leasing Corp. v. USAF the agency awarded the contract to a company who failed to meet one solicitation requirement. The Board directed reopening of the solicitation and a new round of BAFOs. Contract awards need to be based upon sound evaluation/verification of offers meeting all solicitation requirements [Ref. 161]. Government Technology Services v. Navy was another instance where an agency awarded to an offeror whose equipment knowingly failed to meet RFP requirements [Ref. 162]. This case pertained to an ADPE, software, and services contract valued in excess of $400 million. While assessing the protestors protest allegations, the Board found the initial

awardee's offer contained products that failed to meet the requirements stated in the RFP. Termination of the contract and evaluation of the remaining offers was directed.

g. Miscellaneous evaluation issues

KOH systems, Inc./Transaction Response Management, Inc. (joint venture) v. Department of Justice provided a plethora of Board guidance on several evaluation issues. The Board voiced the position "... the qualifications of evaluators is not an appropriate issue before the GSBCA..." In this case it was found that protestors cannot question the qualifications of an agency's evaluators unless fraud, bad-faith or conflict of interest is alleged. On another protest count, the Board determined that there is no statute or regulation that requires an evaluation plan be complete before a solicitation is issued. Notwithstanding the Board's decision, it makes sense to have the evaluation plan complete by solicitation and the DOD required the plan to be complete by solicitation. The Board supported the agency's requirement that proposals should include all required technical data solicited, and that data should be located in the appropriate section of the proposal as specified in the RFP - "evaluators shouldn't have to search for data... ." Finally, a protest resulting from delay in notification of an offer no longer being considered for an award is valid only if the offeror continued to incur costs as a result of the delay. This is a good reason to pursue good communications with all offerors in order to prevent protests of this type. [Ref. 163]

In Tristar Dynamic, Inc. v. Department of Justice it was found that it is permissible to re-open negotiations after starting pre-award survey inspections, if you discover significant overlooked areas that should have been addressed in the solicitation. Additional information and clarification resulting from concerns raised in pre-award surveys can be solicited from all offerors. Again it appears that an honest error, properly handled, combined with uniform and fair treatment of all offerors can be corrected. [Ref. 164]

When evaluating an offeror's responsibility, poor past performance need not result in an automatic finding of non-responsibility in the case where the offeror had performed well in the past for the procuring agency. The Board has allowed such a selection as within the contracting official's discretion. [Ref. 165]

The confidentiality of the bid evaluation process is also important. Common sense dictates that "inside" information on relative bid status should not be disclosed. An embarrassing protest citing such an impropriety can follow. [Ref. 166]

h. Technical evaluation criteria

Evaluation criteria should support selection of equipment/systems meeting an agency's needs. It is also assumed that these criteria will be applied in a fair and uniform manner. With respect to criteria for rating offered equipment, citation of industry ratings must be done in an

equally fair manner. An agency cannot cite selection based upon a singular favorable article in the face of a majority of articles to the contrary. [Ref. 167]

i. Clarifying discussion limits

If discussions to clarify a response to a solicitation in preparation for evaluation of offers are conducted, the discussions must be labeled as such and obvious to the offeror. The offeror must also be afforded the opportunity to revise their proposal with respect to the discussion item. [Ref. 168] Also in the context of clarification, an offeror may not submit an entirely revised proposal when simply asked by the agency to clarify one small point in the original offer. The Board concluded that to allow such action would "... require the government to consider unwanted and in essence late proposals substituted for initial proposals." [Ref. 169]

In the context of "discussions", an agency cannot be compelled to disclose weaknesses within offers; to do so the Board points out, is to engage in technical leveling [Ref. 170].

j. Competitive Range determinations

Discussion of evaluation and selection criteria cannot escape mention of competitive range determinations. The most important goal here is to provide a reasoned and well documented justification of the determination in the event of a protest. The Board generally supports a justified agency

position [Ref. 171]. In Kramer Systems v. Navy, the Board reiterated the importance of a well reasoned and documented range determination by contracting officials in the defense of a protest. This case comprised a requirements contract where the evaluation of offers had to be made upon the best estimates of need by the agency at the time of award. The Board supported the agency's well documented and reasoned position [Ref. 172]. Orange Systems v. USAF is an example where agency reasoning and documentation was deficient. The range determination was wrong and the notification transmittal sent to excluded offerors was inadequate [Ref. 173].

If an agency feels that it made a reasoned, valid determination to eliminate an offeror from the competitive range, it should not reverse that finding. To reverse a proper award in order to reopen negotiations in an effort to avoid a protest action (that the agency could defend) invites another from the reversed awardee who will most certainly prevail in yet another protest to reinstate. [Ref. 174]

k. Non-responsive offers

An offer may contain statements for consideration/problem solutions that are not included in the solicitation as long as the terms and conditions of the solicitation (in this case an IFB) are honored and the conditions remain unaltered [Ref. 175].

Offers that are technically unacceptable require clear notification of their status (as technically unacceptable). The agency contracting officials twice forwarded letters to a disappointed offeror but did state the offer was technically unacceptable. FAR 15.1001(a) requires prompt notification in the case of an unacceptable offer. [Ref. 176]

An agency can insist that an offer contain information pertaining to ADPE system capabilities and an offeror must represent that it can specifically meet the government's requirements. The Board refused a protest of an agency's non-responsive finding stating "Responsiveness is gauged not by whether an offeror is objectively capable of meeting the Government's requirements, but by whether it has represented in its offer that it can and will do so." and "... to contend that ADPE system capabilities don't need to be explained since they are industry standard features shared by all like products is not being responsive." [Ref. 177]

Bids failing to meet mandatory requirements stated in an IFB can be correctly rejected. If no bids responding to a solicitation are fully responsive, then the agency can cancel the IFB and complete the acquisition via negotiation. [Ref. 178] [Ref. 179] [Ref. 180]

Rejection of "equal" equipment proposed by an offeror should only occur if the agency has positive proof that the equipment fails to possess the required capabilities. This proof can be required by an operational test on

a specific test date. Federal systems Group, Inc. v. GSA provides an extensive discussion of "brand name or equal" procurements [Ref. 181].

An agency can expect to enforce pricing instructions to the letter an specified in the RFP. The Board noted offers not meeting the stipulated pricing instructions can be dismissed as non-responsive [Ref. 182].

l. Post-award issues - a problem area

The improper termination of awards is a significant trouble area as indicated by the number of cases falling into this category. The most common cause of agency initiated award reversals is a filed or threatened protest filing citing some aspect of the evaluation/selection process. The agency often reverses a valid award only to be protested by the original awardee, an admittedly frustrating situation. Review of the protest decisions supports sticking to the original agency selection assuming it was based upon a sound criteria and decision process. Documentation of the decision is again also important. The Board voiced its authority to "suspend, revoke, or revise" an improper procurement action included the reinstatement of an improperly terminated contract [Ref. 183]. A similar case in Data Switch v. Navy also points to the difficulty in granting an agency protest seeking reversal only to then receive a Board protest by the disappointed awardee. [Ref. 184] In TTK Assoc. v. Interior, The Board again reiterates that an agency needs to provide substantive reasons for reopening negotiations and

retracting an award (in this case they did not) [Ref. 185]. Many additional cases reiterate post-award perils. [Ref. 186] [Ref. 187]

Another variation of the post-award peril is Micro Star v. Army. In this case the agency, upon protest, admitted to faulty specifications and sought to correct and award or resolicit. The Board refused and directed an award to the protestor (the second lowest bidder) in the absence of a protest by the awardee whose offer expired for lack of a protest. [Ref. 188]

In the event that an error is discovered after release of technical score and price data of the winning offer, it is permissible to terminate the award, resolicit new BAFOs but require the offerors to allow release of their respective technical scores and prices. While this might appear to be technical leveling, the Board allowed this action in Federal Data Corp. v. HHS. [Ref. 189]

After making the case for "sticking to your guns" the case of Amerinex Services Corp. v. GAO comes to mind. It is important to note this is an isolated example where the Board agreed that the agency's original award was in fact flawed and the post-award reversal was proper despite claims to the contrary in the protest. [Ref. 190]

D. CHAPTER SUMMARY

Chapter III covered a lot of material. Opening with general comments on lessons learned, the chapter continued with a discussion of common misconceptions of protests by ADPE managers. The GSBCA takes its ADPE protest jurisdiction seriously. Overall, the Board appears to take a reasonable position on a wide spectrum of ADPE protest actions. Both the protestor's and Government's positions are given a fair hearing. In order to present a strong case before the Board, the governmental agency must have conducted its procurement in accordance with applicable statute, Federal regulations and agency regulations. Well conceived procurement documents and reasoned decisions form a sound basis for a successful protest response.

With regard to protest misconceptions, the Government does not "lose" a majority of the protest actions raised with the Board. Clearly, where a procurement is not conducted in accordance with applicable statute and regulations, the chance of prevailing in a protest action is not good. Remember that the Government "wins" dismissals in 50% of the protests. Note that it is the agency's conduct of procurement actions that determines its chances of success before the Board. Fewer than one quarter of GSBCA ADPE protest actions run the statutory limit of 45 days. The vast majority are resolved much sooner. However, it is still better to avoid GSBCA protests through careful conduct of agency procurements. Finally very few agency ADPE

procurements are protested. Recall that fewer than four tenths of a percent of the 47,488 ADPE procurements conducted in FY 1988 were protested.

The majority of the chapter presented lessons learned from GSBCA decisions. Specific lessons learned were grouped into 5 areas: Brooks Act/Warner Amendment issues, eligibility and basis for filing protests, deadlines and timeliness of protests, RFP/IFB/CBD issues, and evaluation and selection issues. The first areas dealt primarily with establishing the Board's jurisdiction to hear the protest. Ambiguities surrounding the Board's Brooks Act jurisdiction and interpretation of the Warner Amendment exemptions have diminished with the passing of time. Clarification of statutes through further statues of court proceedings have supported an equilibrium of sorts in these areas.

The next two areas, eligibility and basis, and deadlines and timeliness determine the validity of the protest filing. The Board is concerned not only with jurisdiction over the protest, but also the technical aspects of the filing. The final two areas discussed were RFP/IFB/CBD, and evaluation and selection. These areas were primarily concerned with the agency's conduct of the procurement actions in accordance with statute and regulations. Careful adherence to guidelines is important in both the solicitation, evaluation, and selection of offers.

A well conceived solicitation document and carefully conducted evaluation and selection process will reduce the likelihood of protest actions. In the event

such a protest action is sustained, sound reasoning supported by adequate documentation will serve as the basis for a sound protest defense before the Board.

IV. GSBCA LESSONS LEARNED FROM THE LITERATURE

A. GENERAL LESSONS DERIVED FROM GSBCA DECISIONS

Chapter III presented detailed lessons learned from over 200 of the more significant GSBCA decisions. The following discussion presents additional, more general, information also of use to the Federal ADPE manager. GSBCA decisions still serve as the basis for this analysis only the level of detail is one step removed. The topics are presented in the form of questions (in no specific priority) to keep the presentation simple and include the following:

- When can you expect a protest action?
- Is the size of your procurement a determining factor in protests?
- What phase of the procurement cycle experiences the most protests?
- What type of procurements receive the most protests?
- When should you consider settlement versus seeing the protest through the GSBCA process?
- Is a centralized versus decentralized approach to protest response better?
- Who pays for costs assessed by the Board (if any)?

1. When can you expect a protest?

There are two interpretations of what this question really asks. One is "In what time frame or phase in the sequential acquisition process does a protest occur?" A second interpretation is "What actions can result in a protest?" The time related issue will be answered here and the phase issue is addressed in sub-section 3 of this chapter. The answer to the larger question of what actions may result in protest actions covers a much larger area and is answered by combining the lessons learned of this chapter.

The GSA IRMS database now contains in excess of 1,200 ADPE protest cases. Thus it is safe to conduct some trend analysis in support of determining lessons-learned.

Regarding the question of when a protest can be expected, there are two phenomenon to consider in answering this question. The monthly distribution of filed protests is not uniform throughout the year. In retrospect this is not so surprising when the functional dynamics of the Federal budget process is taken into consideration. The majority of ADPE protests cluster in the month of October. A relative plateau exists from March through July. February is the sparsest month for protests [Ref. 191]. The seasonal nature of the protest filings likely correlate closely to the end of year push to obligate expiring program funds or to efficiently use funding available from

other stalled procurement efforts. In addition, the cumulative effect of delays and/or protests sustained earlier in the fiscal year probably contribute to the year end log-jam.

2. Do large procurements attract attention?

GSA IRMS/GSBCA case data doesn't directly address this question. Assembling this data in the context of over 1200 GSBCA cases is beyond the scope of this study. What can be said is that the sheer effort of completing a viable a protest before the GSBCA or any other venue is significant. While the GSBCA proceedings are simplified and streamlined when compared to conventional court proceedings, their conduct never-the-less requires expertise and training in the legal arena. This expertise clearly must be procured at some cost. Some Federal ADPE managers have lamented the ease with which a disappointed offeror/bidder, for 29 cents in postage, can send a protest to the Board and delay a procurement. It's important to note that the protest process, especially as conducted before the GSBCA, is intended to facilitate the fair and prompt resolution of ADPE (and other) procurement disputes. The ease of filing is intended to support this charter.

Due in part to the fact that GSBCA proceedings are conducted as complete "trials" unlike more abbreviated GAO or Agency protests, the costs of such an effort can frequently exceed $100,000 [Ref. 4:p. 24]. A rule of thumb offered by Mr. Carl Peckinpaugh of the Air Force's Office of the General Counsel, offers a rule of thumb of $50,000 to $100,000 for typical legal costs.

He also notes that costs over $1 million are not uncommon for bigger cases [Ref. 192]. Even though the GSBCA proceedings operate under a constrained (by design) schedule of no more than 45 working days (equating to approximately 64 calendar days), the sheer amount of work inherent in the written and oral discovery phases, hearings, and post hearing briefs all factor into the legal cost equation. With these costs in mind, it becomes apparent that only in the larger value acquisition efforts does the balance of risk versus potential gain tip in favor of protest action. Low value acquisitions don't justify high legal costs. An example of a nonsense situation is that of $100,000 in legal fees in pursuit of a $1 million contract when there is a less than certain chance of prevailing. That same $100,000 in pursuit of a $300 million contract allows the protestor to assume a higher degree of risk in pursuing the protest, thus higher value contracts/acquisition efforts are more likely targets for protests. [Ref. 193]

"Bigger" acquisitions can attract more attention and bidders. This fact is understandable due to the greater financial gain Additionally, these same acquisitions tend to be technically complex since they tend to encompass functional requirements of many users. Larger acquisitions may also attempt to procure diverse ADPE in integrated systems.

3. What phase of the acquisition process experiences the most protests?

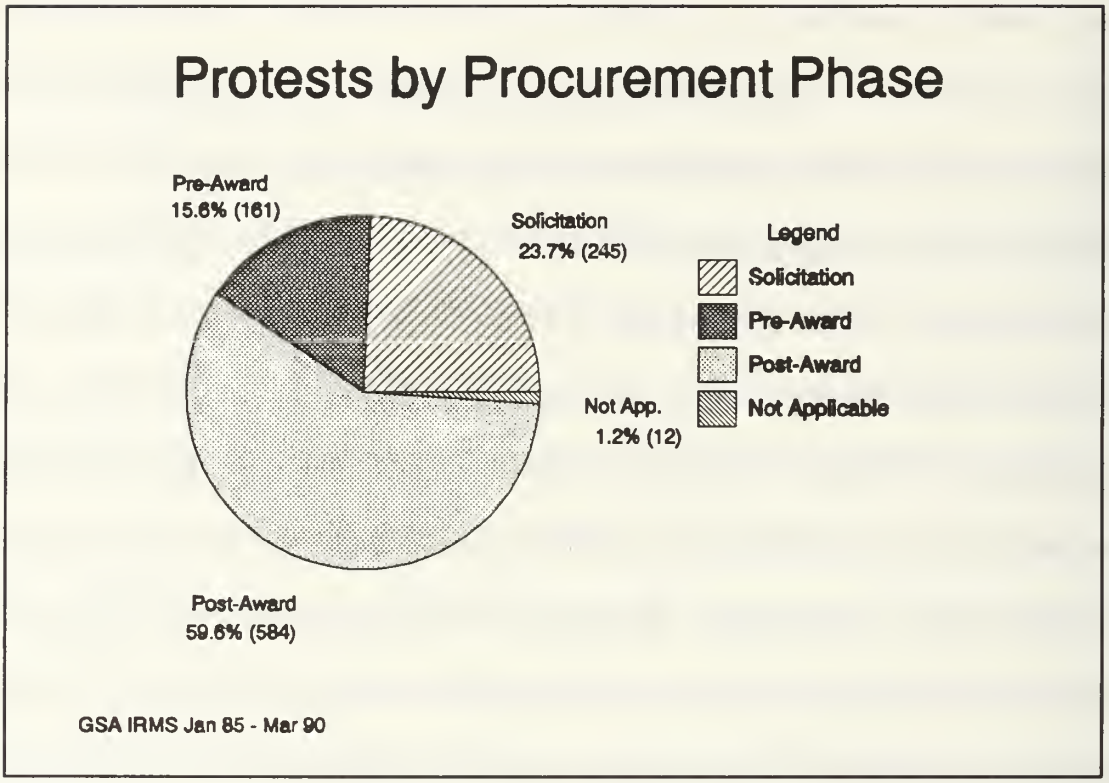

Figure 4

Of the 1032 protests filed during the period Jan 85-Jun 90, 23.7% (245 cases) occurred in the Solicitation phase, 15.6% occurred during the Pre-Award phase (161 cases), 59.5% occurred during the Post-Award phase, and 1.2% (12 cases) were not applicable to this analysis (see Figure 4). Thus roughly a quarter of the protests occurred during the Solicitation phase, likely due to issues pertaining to defects in requirements. Slightly under one in six protests occurred during the Pre-Award phase, probably due to alleged defects in competitive range determinations. Finally nearly 60% of the protests occur

during the Post-Award phase. This is most likely due to allegations of defects in the evaluation and award process. These figures have remained relatively constant over time and can be expected to be typical for future planning. [Ref. 194]

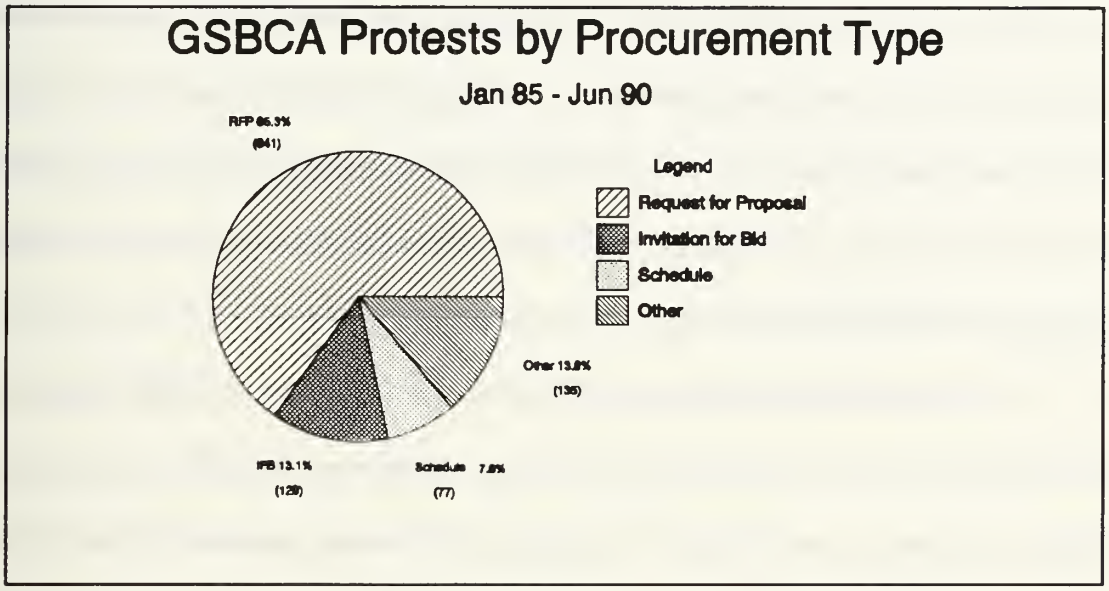

Figure 5

4. What type of procurements receive the most protests?

Cumulative percentages reflecting 982 cases during the January 85 - March 90 time frame yield the following statistics: the Request for Proposals (RFP) procurement method evidenced 65.3% (641 cases) of the protests, the Invitation for Bids (IFB) sealed bid method saw 13.1% (129 cases), and GSA Schedule purchases saw 7.8% (77 cases). A final category "Other" comprised of A-109, two-step, 8(a) set asides, small purchases and renewal options accounted for 13.8% (135 cases) of the protests (see Figure 5). [Ref. 195]

5. When should you consider settlement versus seeing the protest through the GSBCA process?

There are two main situations when you should consider settlement. The first, is when you assess your agency's chance of successfully responding to a protest action as poor. There is no point in going through the relatively costly and time intensive protest process if you perceive the protestor to have a valid case and the government has little chance of prevailing. If your agency does not prevail, your agency may be assessed both the protestor's offer preparation and legal costs.

The second situation where a settlement in lieu of a GSBCA decision is desirable is where time is of the essence. As discussed earlier in this study, GSBCA decisions are among the most timely of protest venues. However, they take as much as 45 working days to complete. Your agency may, for operational (e.g. urgent need) or budgetary (e.g. expiring funds) reasons not wish to sustain the time required to defend a protest. Your procurement protest may in fact be defensible or even marginally defensible. Time may be saved in the context of a relatively small financial outlay to satisfy the protest (e.g. offer preparation costs). Expiring funds can be another compelling consideration prior to the end of a fiscal year where a protest action could prevent obligation of the (expiring) funds.

Settlements involving a reversal of award in the post-award period, should be approached very cautiously. Such a scenario goes as follows. The

agency has awarded a contract to the chosen successful offeror. One or more of the disappointed offerors files a protest alleging an impropriety in the acquisition. The protestor is willing to "withdraw" the protest if the award is reversed and further negotiations or offers are entertained. The agency reverses the award and reopens negotiations to avoid the initial protest. The original awardee subsequently files a protest alleging that no improprieties occurred, seeking reinstatement. Numerous Board decisions have reversed agency award cancellations in similar situations due to insufficient justification. The Board has maintained the initial award process must have been significantly flawed to obtain GSBCA agreement with the reversal. The original awardee, is virtually guaranteed a post-award reversal unless the agency made serious errors. The agency is in a dubious role of arguing that it conducted a flawed procurement and should be allowed to reverse the award. If your agency has a defensible position, the best strategy is likely to "stick to your guns" and complete the protest process.

6. Is a centralized versus decentralized approach to a protest response better?

Agencies have chosen differing approaches toward dealing with the inevitability of GSBCA ADP protests. The two most common methods are the Centralized Defense method and the Decentralized Method. These labels are

not official but were chosen due to their highly descriptive nature. Each method has its strong and weak points. All choices represent compromises of sorts.

The Centralized Defense approach employs a specialized section of the agency's upper echelon legal branch (e.g. General Counsel's Office). This section is tasked with handling virtually all agency ADP protest actions. The benefit of this approach is that experience and expertise is cultivated in one location. The assigned legal counsels gain a high level of competence in dealing specifically with the procedures and requirements of the GSBCA [Ref. 196].

Possible weaknesses with the centralized method include the potential for both geographic and functional separation between the responding procurement entity and their agency GSBCA counsel. There are merits to regional or local affiliations between commands/their procuring agents and counsel. Within these localized affiliations there exists the potential for the counsel to gain familiarity with the procurement through prior acquisition actions, and the relative ease of face to face meetings to further build a defense strategy. Functionally, if the procuring entity routinely works closely with counsel on procurements both a strong working relationship and familiarity with the procurement at hand is fostered. This familiarity facilitates a rapid if not instant comprehension of the procurement details when preparing for response to a protest. On the other hand, the specialized nature of GSBCA

ADP defense proceedings works against the local or regional agency counsel who must familiarize themselves with the technical intricacies of varying venues. Thus can arise the dubious situation of the government being represented before the GSBCA by a competent but inexperienced counsel.

Arguments for the Decentralized Defense method were largely presented above as weaknesses in the Centralized approach. Established working relationships between the procuring activity and the counsel generally exist. The local/regional counsel is often familiar with the details and requirements of the procuring activity acquisition due to frequent involvement in these procurement actions. Negatives previously mentioned are the difficulty in cultivating experience and proficiency in response to protest actions before the GSBCA. Current trends in GSBCA rulings may escape the local counsel tasked with a varying caseload largely in other venues. Often nuances inherent in the interpretation of both ADP procurement statutes and regulations, and previous GSBCA rulings may escape the competent but multi-tasked counsel.

While both the Centralized and Decentralized Defense methods have merit, the GSA's Information Resources Management Service notes that the balance between these opposing methods tips toward the centralized approach. U.S. Air Force experience also supports the centralized approach voiced by the GSA. Carl Peckinpaugh, an attorney with the Secretary of the Air Force Office

of General Counsel, notes that while centralization may not be the answer for all agencies or all protests, but its merits should certainly be considered [Ref. 197].

GSA IRMS points to the following reasons for implementing a centralized approach: Counsel experienced in GSBCA proceedings are more likely to seize opportunities to gain denial or dismissal of protests due to their familiarity with the proceedings. Although the GSBCA is governed by very clear, concise rules, these very same rules reduce the prospect for legal maneuvering, and strict, brief time frames are a matter of course. These strict time limits favor counsel well versed in the Board's procedures since they can devote all their (limited) time to the specifics of the case, without the need to acquaint or reacquaint themselves with GSBCA procedures.

The argument for experienced counsel to represent the government agency is even more compelling when the one considers the calibre of counsel employed by the protestor. Protestors have the option of hiring the most capable and GSBCA experienced legal counsel to oppose the government. Since the protestor can often count on award of not only legal counsel costs but bid preparation costs, there may be little to limit signing on the best "hired-guns" that the profession has to offer.

7. Who pays for costs assessed by the Board (if any)?

Payment of costs assessed as a result of protest judgement can come from two sources: agency funds (e.g. O&MN) or the U.S. Treasury's Permanent

Indefinite Judgement Fund. Exactly which of these sources actually pays depends upon the venue of the protest. The Permanent Indefinite Judgement Fund is a revolving fund used to immediately pay off judgements against the government. Agencies are required to reimburse the fund and its main purpose is to provide for rapid payment of judgements. Reimbursement of the fund occurs in 99% of the cases and is generally taken from the agency's O&MN funds. The agency itself may or may not ultimately come back to the specific project/buying activity for reimbursement. There are two situations that deviate from the preceding general payment scenario, GAO and GSBCA protest judgements. In the case of a GAO protest, under CICA, statute requires the (losing) buying activity *itself* to directly pay out funds to satisfy protest awards, a painful situation. The Permanent Indefinite Judgement Fund never enters into the picture. Another statutory anomaly occurs in the case of GSBCA protest judgements. In a GSBCA proceeding, any assessed judgements/costs are paid out of the Permanent Indefinite Judgement Fund but due to a statutory loophole, the agency is not required to reimburse the fund in the specific case of a GSBCA action - a seemingly ideal situation for the agency. How long this statutory loophole is allowed to remain is unknown. In this age of ever tightening Federal budgets, agencies may not be able to count on the PIJF as their protest cost award savior.

B. LESSONS FROM A U.S. ARMY HARRY DIAMOND LABORATORY MAINFRAME PROCUREMENT

The previously mentioned U.S. Army, Harry Diamond Labs (HDL) procurement article entitled *Performance, Procurement, & Protest -- The Good The Bad and The Ugly* chronicles what initially appeared to be a straight-forward procurement of a replacement mainframe at the lab. It offers some excellent lessons for the acquisition and protest response teams. The following bullets are quoted and/or paraphrased from the article:

- Be prepared for a protest from the day the procurement starts.
- Ensure that your attorneys have litigation experience and a technical background.
- Spend time getting organized and establish a mechanism to deal with the volumes of paper.
- Have your attorneys prepare you for giving dispositions and trial testimony.
- Dealing with the disposition and trial transcripts (several thousand pages) is a nightmare.
- Be ready for the language of the protest ["legalese"].
- It is important to establish a document retention [destruction] plan.
- Make use of other government agencies' protest experience.
- Remember to be a team and support each other.

- With respect to the RFP, do not assume or require any technical knowledge on the part of the offerors.
- Spell out evaluation criteria in excruciating detail, all objective measures in Section M of the solicitation. [Ref. 198]

In this author's opinion, the HDL article (authors Kircher and Rosen) is written in a decidedly matter of fact manner, evident in the wording of the above bullets. The frank manner helps convey a sense of humor to the description of the frustrating and difficult protest proceedings. Further amplifying the bullets, the defense of the protest was accomplished by a team made up of procurement, technical, and legal personnel. Each team member contributed their expertise to the issue at hand. The need for immediate preparation for a protest action stems from the relatively short nine-week GSBCA protest process. During this time, Kircher and Rosen noted the technical team worked 76 hour weeks for a period of six weeks.

The protest attorneys in the HDL possessed an intimidating technical background independent of their legal expertise. Thus Kircher and Rosen's recommendation for technically experienced counsel. The authors also noted difficulty in comprehending the prose of legal writing. They also warn of a legal ploy to cultivate dissention in the ranks of the defense team by pitting the technical personnel against the procurement personnel.

The need for organization stemmed from the need to set up notebooks and master indices for all protest related paperwork. HDL overflowed four three-foot long bookcases in the process. The need for a dedicated work space was also noted. A shared conference room is not acceptable. Dedicated administrative support was also required. A dedicated facsimile machine was also recommended if the defense attorneys are not on-site.

Pre-disposition/testimony rehearsals helped in preparing for the types and format of questions asked at the board hearings. A related issue of dealing with the transcripts of the testimony and proceedings, called for securing copies of the proceedings in a machine readable format (e.g. floppy disks). The magnetic media would have made manipulation and access to testimony easier.

The document retention plan (otherwise known as a document destruction plan) targets destruction of unnecessary agency documents less they be the subject of discovery requests. This is not illegal, only a prudent business practice. For example, personal notes on the procurement or protest proceedings that are no longer germane should be destroyed. Conversely, retention of communications documented with vendors and bidders is necessary for defense purposes.

The HDL experience stressed use of other Government agencies' lessons learned and expertise in formulating a defense. This study is an effort to combine and condense existing knowledge in information. The balance of the

recommendations presented were covered in points brought out previously in Chapter III of this study.

V. CONCLUSION

The stated intent of this study was to compile a ADPE protest primer for the new Federal ADPE manager. Research into the statutory origins of ADPE protests was undertaken to compile a summary assessment of the legislation that guides ADPE procurement and protests. Over 200 significant GSBCA protest decisions were studied and summarized to derive specific and general lessons learned from the protests. Available literature was also surveyed to provide additional ADPE protest lessons to round out this primer.

In summary, Federal ADPE acquisition is a complex and at times, frustrating undertaking. Understanding the statutory origins of the Brooks Act, CICA and PRRA provide insight into the intent of Congressional oversight and a perspective on how the procurement process has developed. ADPE protests are a common occurrence in the day-to-day business of Federal ADPE acquisition. It is better to have an understanding and appreciation of the impact of protests before they occur, than to blindly encounter them as they occur. There are lessons to be learned from the past mistakes of other ADPE managers. Protests are not inevitable. Given the level of difficulty in negotiating the acquisition "mine field," the benefits of lessons learned can go a long way in reducing this problem area in the procurement process.

Avoiding past errors is no guarantee that the future will hold no other perils, however, there is no wisdom in repeating past mistakes.

The GSBCA while not the sole venue, is a primary one for ADPE protests. Over twelve hundred decisions have been rendered by the Board to date. The early days of GSBCA ADPE decisions were a somewhat turbulent time. Ambiguities in applicable statutes initially left some question regarding the Board's jurisdiction. Legislation updating original Brooks Act, a large base of GSBCA ADPE decisions, and amplifying decisions by the Court of Appeals (Federal Circuit) have all combined to yield today, a equilibrium of sorts with regard to ADPE protests. It appears that more Federal ADPE managers are studying past and present protests to benefit from potential lessons learned. The GSA's Information Resources Management Service continues to provide excellent quarterly summaries of GSBCA protest decisions in the form of the *ADP Protest Report*.

As trite as it may sound, a procurement diligently and competently pursued, will not likely sustain many or any protests. If ADPE procurement statutes and regulations are closely adhered to (not necessarily *perfectly* adhered to) a potential protestor is not likely to proceed or prevail with a weak complaint. The Board's track record of firm, but fair, handling of protest cases effectively supports both the protestor's and Government's interests. Treating the offeror/bidder "right" throughout the procurement process goes a long way toward avoiding protests. Competence is expected of government agents,

however, minor errors are often tolerated, and cooperation in Board proceedings is demanded. While ADPE protests are not to be taken lightly, they need not be feared if the agency has done a reasonable job of pursuing its acquisitions.

The extensive and potentially onerous study of GSBCA decisions required to complete this research was not without its moments of amusement. As is often typical in the rendering of judicial decisions, wry prose is used to make a point while providing subdued comic relief. In the case of Pacificorp v. Navy, Pacificorp sought recovery of protest costs, having prevailed in an earlier action. [Ref. 199] The Board awarded Pacificorp all costs in its pursuit of its successful protest with one exception: "... Although [the protestor] is entitled to recover the reasonable costs of filing and pursuing its protest, our review of the detailed cost records submitted... disallow[s] $1.98 for the purchase of two 'baguettes' at a local grocery store. We expect the local counsel to purchase rolls no matter how light and flaky the crust may be, at their own expense..."

Know and follow your RFP guidelines, treat all offers/bids uniformly, and award contracts in accordance with your evaluation criteria.

A procurement diligently and competently pursued,

will not likely sustain many or any protests.

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